



## INDEX.

	PAGE
Statement—Questions of law involved.....	2
The Eighteenth Amendment is a valid part of the Constitution of the United States.....	4
The purpose and effect of the Eighteenth Amendment is to impose a general prohibition upon the traffic in intoxicating liquors for beverage purposes throughout the territorial limits of the United States.....	5
When a state legislature or Congress possesses power to prohibit a recognized evil like the beverage liquor traffic, it carries with it inherently the power to make its action effective, and may include within the scope of its prohibition acts innocuous in themselves.....	6
Twenty-nine states have prohibited beer for medicinal purposes under their police power, and the Eighteenth Amendment confers a similar legislative discretion upon Congress. The courts have uniformly sustained the legislation prohibiting beer as a medicine .....	13
The power of Congress to effectively prohibit the manufacture and sale of beverage liquors is as full and complete as the police power of the state to enforce such prohibition .....	29
The right to manufacture or sell intoxicating liquors is not an inherent right of citizenship.....	35
There is no right to practice medicine which is not subordinate to the police power.....	35
Congress prior to the Eighteenth Amendment prohibited the introduction of liquors into the Indian country. These acts contained no exceptions providing for medicinal use. The Alaska Prohibition Law permits alcohol only for medicinal use.....	38
The power to prohibit the manufacture or prescribing of liquor absolutely being established it necessarily includes the lesser power to regulate or permit conditionally .....	39
Legislative acts are presumed constitutional. In the exercise of its power to effect a Constitutional purpose Congress is the judge of the methods to be employed and the necessity which occasions their employment .....	44

	PAGE
The Fifth Amendment imposes no greater limitation upon Congress than the Fourteenth Amendment does upon the states .....	49
The evil sought to be prevented by the Eighteenth Amendment is the same as that sought to be prevented by the states in the exercise of their police power. If the subject of legislation be debatable the Legislature is entitled to its own judgment.....	50
The Eighteenth Amendment conferred no new right to manufacture or prescribe intoxicating liquors.....	53
Congress investigated the alleged therapeutic properties of beer. The overwhelming testimony of physicians, druggists and brewers showed that beer had no medicinal value .....	53
Conclusion .....	57

#### AUTHORITIES CITED.

Ah Sin v. Whitman, 198 U. S. 500.....	8
American Express Co. v. Beer, 65 So. 581.....	43
Armour Co. v. North Dakota, 240 U. S. 510.....	52
Barbour v. Georgia, 249 U. S. 454.....	35
Bartemeyer v. Iowa, 18 Wall. 129.....	35
Booth v. Illinois, 194 U. S. 425.....	8
Brushaber v. Union Pacific R. R. Co., 240 U. S. 1.....	46
Central Lumber Co. v. South Dakota, 226 U. S. 164....	52
Champion v. Ames, 188 U. S. 321.....	33, 46
Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 321 .....	41
Civil Rights Cases, 109 U. S. 3.....	32
Cooper v. State, 172 Pac. 276.....	26
Corneli v. Moore, 257 U. S. 491.....	33
Crane v. Campbell, 245 U. S. 304.....	8, 9, 25, 35
Cureton v. State, 135 Ga. 660, 70 S. E. 332, Appeal dismissed, 229 U. S. 630.....	14
Dakota T. Co. v. South Dakota Co., 250 U. S. 163.....	46
Dent v. West Virginia, 129 U. S. 114.....	35
Dillon v. Gloss, 256 U. S. 368.....	4
Erie R. R. Co. v. Williams, 233 U. S. 685.....	52
Ex parte Hixson, 214 Pac. 677.....	27
Ex parte Webb, 225 U. S. 663.....	38
Fong Yue Ting v. U. S., 149 U. S. 698.....	46

	PAGE
Gibbons v. Ogden, 9 Wheat 1.....	46
Giozza v. Tiernan, 148 U. S. 657.....	35
Gloucester Co. v. Pa., 114 U. S. 196.....	33
Gray v. State of Conn., 159 U. S. 74.....	36
Grogan v. Walker, 259 U. S. 80.....	5, 33
Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 156 .....	45, 49
Hebe Co. v. Shaw, 248 U. S. 294.....	52
Hoke v. United States, 227 U. S. 309.....	9, 33
Hallowell v. United States, 221 U. S. 317.....	38
Interstate, etc., & Ry. Co. v. Mass., 207 U. S. 79.....	45
Joplin Mercantile Co. v. U. S., 236 U. S. 531.....	38
Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224..	52
Kidd v. Pearson, 128 U. S. 1.....	35
Knox v. Lee, 79 U. S. 457.....	48
Luther v. State (Neb.), 24 L. R. A. (N. S.), 1146.....	8
McCray v. United States, 195 U. S. 27.....	46, 49
McCulloch v. Maryland, 4 Wheat. 316.....	46, 48
Martin v. Hunter, 1 Wheat. 304.....	47
Motlow v. State, 125 Tenn. 547, 145 S. W. 177, Appeal dismissed, 239 U. S. 653.....	22
Mugler v. Kansas, 123 U. S. 123.....	35, 45
Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445.....	43
O'Neil v. State, 115 Tenn. 427, 90 S. W. 27.....	37
Otis v. Parker, 187 U. S. 606.....	8
Pennel v. State, 141 Wise. 35.....	8
Perrin v. United States, 232 U. S. 478.....	38
Price v. Illinois, 238 U. S. 447.....	51
Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192....	6
Rast v. Van Deman, 240 U. S. 342.....	46, 53
Re Crane, 27 Idaho 671, 151 Pac. 1006.....	24
Reetz v. Michigan, 188 U. S. 503.....	37
Rhode Island v. Palmer, 253 U. S. 350.....	4, 29, 33
Rippey v. Texas, 193 U. S. 504.....	43
Ruppert v. Caffey, 251 U. S. 264.....	31, 32, 50
Seven Cases v. United States, 239 U. S. 510.....	9
Silz v. Hesterberg, 211 U. S. 31.....	8
Southern Express Co. v. State, 188 Ala. 454, 66 So. 122..	43
State v. Davis, 194 Mo. 485, 92 S. W. 484.....	37
State v. Doe, 92 Kan. 212, 139 Pac. 1170.....	43
State v. Durein, 70 Kan. 1, 78 Pac. 152, affirmed 208 U. S. 613 .....	17

	PAGE
State v. Edmunds, 127 Ia. 333, 101 N. W. 431.....	37
State ex rel. Guilbert v. Kauffman, 60 Ohio St. 635.....	8
State v. Jenkins, 64 N. H. 375.....	8
State v. Kane, 15 R. I. 395, 6 Atl. 783.....	23
State v. Kennedy, 16 R. I. 409, 17 Atl. 51.....	24
State v. Kurent, 105 Kan. 13, 181 Pac. 603.....	21
State v. Macek, 104 Kan. 742, 180 Pac. 985.....	20
State v. Miller, 92 Kan. 994, 142 Pac. 979.....	19
State v. O'Connell, 99 Me. 61.....	8
State v. Rosenkrans, 30 R. I. 374, 75 Atl. 491.....	37
State v. U. S. Express Co., 164 Ia. 112, 145 N. W. 451....	43
State v. Weiss, 85 Kan. 165, 113 Pac. 388.....	18
State v. York, 74 N. H. 125.....	8
Stewart v. Kahn, 78 U. S. 493.....	48
U. S. v. Behrman, 258 U. S. 280.....	12
U. S. v. Cohn, 52 S. W. Rep. 38, 2 Ind. Terr., 474.....	38
U. S. v. Cruikshank, 1 Woods 308.....	32
United States v. Des Moines Co., 142 U. S. 510.....	46
U. S. v. Doremus, 249 U. S. 86.....	10, 33
U. S. v. Ferger, 250 U. S. 199.....	9, 33
U. S. v. Fisher, 2 Cranch. 358.....	46
U. S. v. Rhodes, 1 Abb. U. S. 28.....	32
U. S. v. United Shoe Machinery Co., 234 Fed. 127.....	44
U. S. v. 43 Gallons of Whiskey, 93 U. S. 188.....	38
U. S. Express Co. v. Friedman, 191 Fed. 673.....	38
Veazie Bank v. Fenno, 75 U. S. 533.....	48
Watson v. Maryland, 218 U. S. 172.....	37
Webb v. U. S. 249 U. S. 96.....	11
Weber v. Freed, 239 U. S. 325.....	46
Williams v. Arkansas, 217 U. S. 77.....	37

**MISCELLANEOUS.**

Hearings before House Judiciary Committee, 67th Con-	
gress .....	53

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1923

---

No. 200

JAMES EVERARD'S BREWERIES, *Appellants,*  
*against*

DAVID H. BLAIR, *Commissioner of Internal Revenue of*  
*the United States, et al., Respondents.*

No. 245

EDWARD AND JOHN BURKE, LTD., *Appellants,*  
*against*

DAVID H. BLAIR, *Commissioner of Internal Revenue of*  
*the United States, et al., Respondents.*

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AMICI CURIAE***On Behalf of Respondents*

In view of the provisions of law in State codes relating to the manufacture and prescribing of medicinal liquor, similar to the provisions of the National Prohibition Act the outcome of this case is of vital interest to the States. With the permission of the Court this brief is filed in the hope that some of the authorities and reasons given may prove helpful in the consideration of the questions of law involved.

**PROPOSITIONS OF LAW SUSTAINED BY THIS  
BRIEF**

This brief is submitted in support of the proposition that the provisions of the Act of Congress of November 23, 1921, known as the Supplemental Prohibition Act prohibiting the manufacture or prescribing of beer for medicinal purposes and the provisions of said act and of the National Prohibition Act regulating the prescribing of whiskey and wine and limiting the quantity which may be prescribed within a period of ten days, are appropriate legislation for the enforcement of the Eighteenth Amendment and are constitutional.

**CONSTITUTIONAL AND STATUTORY PRO-  
VISIONS INVOLVED**

The Eighteenth Amendment to the Constitution of the United States provides that "the manufacture, sale or transportation of *intoxicating liquors* within, or importation thereof into, or the exportation thereof from the United States, and all territory subject to the

jurisdiction thereof for *beverage purposes* is hereby prohibited."

Section 2 of said Amendment is as follows: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

Pursuant to the Eighteenth Amendment Congress has enacted the National Prohibition Act (41 Stat. 305), in Section 1 of Title II of which Act the word "liquor" or the phrase "intoxicating liquor" is defined to include "alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, compounds \* \* \* and by whatever name called containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes." This Act (Section 3) also makes it unlawful for any person to manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as is provided in said Act. Section 6 requires a permit to manufacture or prescribe liquor for medicinal purposes. Said Act (Section 37) also requires all manufacturers of certain beverages containing less than one-half of one per centum of alcohol by volume, which are manufactured by the usual methods of fermentation and fortification and dealcoholized before being removed from the factory or marketed, to secure a permit therefor before engaging in said manufacturing.

The Sixty-Seventh Congress enacted an Amendment to the National Prohibition Act being "An Act Supplemental to the National Prohibition Act (Public No. 96, 67th Congress) Approved November 23, 1921." This Act provides that the word "liquor" and the phrase "intoxicating liquor" when used in this Act

shall have the same meaning as they have in Title II, of the National Prohibition Act. Section 2 of this Act provides that "only spirituous and vinous liquors may be prescribed for medicinal purposes and all permits to prescribe and prescriptions for any other liquor shall be void." This Act further limits the amount of spirituous or vinous liquors that may be prescribed upon any one prescription within a period of ten days as well as the number of prescriptions which any physician may issue within a certain stated period.

It is contended that this Amendment (Public No. 96, 67th Congress) is violative of the Eighteenth Amendment for the alleged reason that the Eighteenth Amendment has limited Congress to the prohibition of intoxicating liquors that are used for beverage purposes, and that Congress has no authority to legislate concerning liquors used for non-beverage purposes, and it is also contended that this Act is violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

#### ARGUMENT

#### THE EIGHTEENTH AMENDMENT IS A VALID PART OF THE CONSTITUTION OF THE UNITED STATES.

In the case of Rhode Island v. Palmer, 253 U. S. 350, the court said:

"That Amendment, \* \* \* has become a part of the Constitution and must be respected and given effect, the same as other provisions of that instrument."

See also Dillon v. Gloss, 256 U. S. 368.

THE PURPOSE AND EFFECT OF THE EIGHTEENTH AMENDMENT IS TO IMPOSE A GENERAL PROHIBITION UPON THE TRAFFIC IN INTOXICATING LIQUORS FOR BEVERAGE PURPOSES THROUGHOUT THE TERRITORIAL LIMITS OF THE UNITED STATES.

The Eighteenth Amendment prohibits the manufacture, sale or transportation of intoxicating liquors for beverage purposes. This Amendment, however, does not define what are intoxicating liquors, but having forbidden the traffic in intoxicating liquors for beverage purposes, it confers upon Congress and the several States the power and authority to define what are intoxicating liquors within the constitutional prohibition; and to pass all needful legislation to give effect to the constitutional prohibition against the traffic in intoxicating liquors when so defined.

The unquestioned purpose of this Amendment is to absolutely prohibit all traffic in and use of intoxicating liquor for beverage purposes, and to protect the people against the well known evils of such traffic; and in order to completely effectuate that purpose Congress has been clothed with full power to legislate with respect to the subject matter as will completely and effectively accomplish that purpose. In the case of *Grogan v. Walker*, 259 U. S. 80, the court said:

\*\*\* \* \* \* It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. \* \* \*

WHEN A STATE LEGISLATURE OR CONGRESS POSSESS POWER TO PROHIBIT A RECOGNIZED EVIL LIKE THE LIQUOR TRAFFIC IT CARRIES WITH IT INHERENTLY THE POWER TO MAKE ITS ACTION EFFECTIVE AND MAY INCLUDE WITHIN THE SCOPE OF ITS PROHIBITION ACTS INNOCUOUS IN THEMSELVES.

In *Purity Extract Company v. Lynch*, 226 U. S. 192, the question of the constitutionality of Chapter 113 of the Statutes of Mississippi, 1908, was involved. This statute prohibited the sale of malt liquor called "Poinsetta." It appeared that this malt liquor contained no alcohol and was non-intoxicating and could not be mistaken for beer. The manufacturer contended this Act was unconstitutional. In upholding the constitutionality of this Act the court through Mr. Justice Hughes said:

"Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such is prohibited from being sold in this State.

"It is well established that when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in the prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

"With the wisdom of the exercise of that judgment, the court has no concern; and unless it

clearly appears that the enactment has no essential relation to a proper purpose, it cannot be said that the limit of the legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system.

"It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited among other things, the sale of malt liquor. In thus dealing with a class of beverages which, in general, are regarded as intoxicants, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture, which in the endeavor to eliminate innocuous beverages from the combination would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically presented would save the nominal power while preventing its effective exercise. The Statute established its own category.

"The State within the limits we have stated must decide upon the measures that are needful for the protection of its people, and having regard to the artifices which are used to permit the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from an accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved powers."

That the general prohibition of the sale of malt liquors whether intoxicating or not is a necessary means of suppressing the traffic in intoxicating liquors is very consistently held by the State Courts. On this point see:

State v. O'Connell, 99 Me. 61; State v. Jenkins, 65 N. H. 375; State v. York, 74 N. H. 125; State ex rel. Guilbert v. Kauffman, 68 Ohio St. 635; Luther v. State (Neb.) 24 L. R. A., (N. S.) 1146; Pennel v. State, 141 Wisc. 35.

In the case of Booth v. Illinois, 184 U. S. 425, the question before the court was whether the Legislature of Illinois had the power to declare options to sell and buy grain illegal, although no element of gambling was involved. The court in upholding the constitutionality of this Act said:

"A calling may not in itself be immoral and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If looking at all the circumstances that attend or which ordinarily may attend the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the court cannot interfere, unless, looking through mere form and at the substance of the matter they can say that the Statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of the right secured by the fundamental law. \* \* \* It must be assumed that the Legislature was of opinion that an effectual method to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means applied were not appropriate to the end sought to be obtained and which it was competent for the State to accomplish."

See Silz v. Hesterberg, 211 U. S. 31; Otis v. Parker, 187 U. S. 606; Ah Sin v. Whitman, 198 U. S. 500; Crane

v. Campbell, 245 U. S. 304. Seven Cases v. United States, 239 U. S. 510.

In Crane v. Campbell, 245 U. S. 304, arising under a State law prohibiting the possession of whiskey, even though for medicinal purposes, the court said:

“As the State has the power indicated to prohibit, it may adopt measures as are reasonably appropriate or needful to render exercise of that power effective.”

Similarly when Congress is given power by the Constitution over a subject matter it possesses full power to make the purpose effective. In the case of Hoke v. United States, 227 U. S. 309, the court held where Congress had power to control a subject-matter it could adopt any “convenient” means to accomplish the end. The language of the court is as follows:

“Congress may adopt not only means necessary but convenient to its exercise, and the means may have the quality of a police regulation.”

In the case of United States v. Ferger, 250 U. S. 199, 63 L. Ed. 936, where the Act of Congress prohibiting and punishing the using of false bills of lading in interstate commerce was before the court, in speaking of the power to control incidents reasonably related to the authority conferred the court said:

“We think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce and with a host

of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate *although they are not interstate commerce in and of themselves.*"

In the case of United States v. Doremus, 249 U. S. 86, the Harrison Narcotic Drug Act, making it unlawful to sell certain drugs unless registered, enacted by Congress under Article I of Section 8 of the United States Constitution giving to Congress the right to lay and collect taxes, duties, imposts, and excises, etc., was held by the court to be constitutional. In this case the court said:

"The Congress may select the subjects of taxation, and may exercise the power conferred at its discretion \* \* \* and from an early day this court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the court to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.

"The provisions of Section 2 aimed to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions by physicians. Congress with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity

of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law." —

In this case Congress deemed it wise to prevent the sales of drugs except by registered dealers and to require patients to obtain those drugs as a medicine from physicians and upon regular prescriptions so as to prevent persons from selling drugs without paying the tax.

The Narcotic Drug Act as interpreted by the United States Supreme Court is clearly illustrative of the extent to which Congress may regulate physicians as an incident to a power conferred by the Constitution. This act is passed in the exercise of the taxing power. It would seem that since it is a revenue measure the interests of the Federal Government would be completely served when all of the conditions had been met and the tax collected. Such has not been the interpretation placed upon it by the Supreme Court. In *Webb v. United States*, 249 U. S. 96, 63 L. Ed. 497, certain facts and questions were certified to the Court by the Circuit Court of Appeals, 6th Circuit. The facts were:

"Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users upon their application to him therefor. He furnished these 'prescriptions' not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit, or as might be necessary or helpful in an attempt to break the habit, but with such consideration and rather in such quantities as the applicant desired for the sake of con-

tinuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by Section 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law."

One of the questions asked was:

"If the practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of Section 2?"

The court said:

"As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."

In this case the defendants had registered, paid the tax and kept all the required records which would have insured the collection of the revenue due the government, nevertheless the act as construed imposes a limitation upon the issuance of prescriptions by physicians in the nature of a police regulation which was held not in excess of the power conferred by the Constitution to levy taxes. This view was later affirmed by the Supreme Court in the case of United States v. Behrman, 258 U. S. 280; 66 L. Ed. 619, wherein it was held:

"The exception from the prohibition of the Harrison Anti-Narcotic Act of December 17, 1914, section 2, against sales of narcotic drugs to persons not having a written order in official form, which that section makes in favor of registered physicians dispensing or distributing such drugs to patients in the course of their professional practice only, does not protect a physician who has issued to one known by him to be a drug addict three so-called prescriptions calling respectively for 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine."

If Congress in the exercise of the taxing power may penalize a physician who issues "so-called" prescriptions for narcotics in such excessive quantities as to indicate that they are not for bona fide medicinal use there is certainly less reason to hold that Congress may not establish reasonable regulations relating to the prescribing of intoxicating liquor under the power conferred by the Eighteenth Amendment to prohibit the beverage use and to provide a penalty for the violation thereof.

#### VIII. TWENTY-NINE STATES HAVE PROHIBITED BEER FOR MEDICINAL PURPOSES UNDER THEIR POLICE POWER, AND THE EIGHTEENTH AMENDMENT CONFERS A SIMILAR LEGISLATIVE DISCRETION UPON CONGRESS. THE COURTS HAVE UNIFORMLY SUSTAINED LEGISLATION PROHIBITING BEER AS A MEDICINE.

The power of a State in the enforcement of its prohibitory liquor laws to prohibit, as an incident necessary to their enforcement, the manufacture and sale of liquors for medicinal purposes has been sustained

by the highest courts of the States and recognized by the Supreme Court of the United States.

In the case of Cureton v. State, 135 Ga. 660, 70 S. E. 332-49 L. R. A. (N. S.) 182, the question of the validity of the Prohibition Act of Georgia, (Acts of 1907, p. 81) was involved. One of the specific questions which was certified by the Court of Appeals to the Supreme Court was: "Is the Act approved August 6, 1907 (Acts of 1907, p. 81), commonly known as the Prohibition Law, unconstitutional and invalid in that it absolutely and totally prohibits the manufacture of alcohol for any and every purpose including its use for medicinal, scientific and mechanical purposes, and its use in the arts as well as other uses than as a beverage?"

The argument which was made and the view taken by the Supreme Court, which was concurred in by all of the justices, is best set forth in the language of the opinion of the court delivered by Judge Lumpkin:

"It was argued that because, under the act of 1907 the sale of alcohol for certain specified purposes and under certain restrictions was not unlawful, therefore to prohibit the manufacture of that which may have a lawful use or sale was violation of the section of the State Constitution which provides that no person shall be deprived of life, liberty, or property, except by due process of law, and likewise of the 14th Amendment to the Constitution of the United States; in other words, that because there may be some lawful use of a thing, the legislature cannot prohibit its manufacture. A somewhat similar argument was advanced in the Mugler Case, *supra*, where it was contended that 'no convention or legislature has the right, under our form of government to prohibit any citizen

from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.' But Mr. Justice Harlan said (123 U. S. 662): \* \* \* 'And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of the question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship.' "

In Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, a statute of Iowa was under consideration. The Supreme Court of that State construed the statute to mean: (1) That foreign intoxicating liquors might be imported into the State, and there kept for sale by the importer in the original package (or for transportation in such packages and sale beyond the limits of the State); (2) that intoxicating liquors might be manufactured and sold within the State for mechanical, medicinal, culinary, and sacramental purposes, but for no other—not even for the purpose of transportation beyond the limits of the State. It held that the statute, thus construed, raised no conflict with the Constitution of the United States and was therefore valid. Accepting this construction, the Supreme Court of the United States declared that "THE RIGHT OF A STATE TO ENACT A STATUTE PROHIBITING THE MANUFACTURE OF IN-

TOXICATING LIQUORS WITHIN ITS LIMITS IS NOT AFFECTED BY THE FACT THAT THE MANUFACTURER OF SUCH SPIRITS INTENDS TO EXPORT THEM WHEN MANUFACTURED." Here was a way in which the liquors could have been used without violating the law prohibiting the sale within the State. But the possibility of such a use did not destroy the right of the State to prohibit the manufacture. Insofar as the decision in that case dealt with the difference between manufacture and commerce, and with the interstate commerce clause of the Constitution of the United States, it is not applicable to the case now before us; but in so far as it dealt with the police power of the State over the manufacture of intoxicating liquors it is in point. Mr. Justice Lamar said (128 U. S. 23): "We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before the court." The State, in the exercise of its police power, has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits. In the case last cited such manufacture was permitted only for particular purposes; BUT WHETHER IT SHOULD BE PERMITTED FOR THOSE PURPOSES OR NOT WAS A MATTER OF LEGISLATIVE DISCRETION.

"In this State the legislature has seen fit to prohibit altogether the manufacture or sale of alcoholic, spirituous, malt, or intoxicating liquors. Alcohol may be sold for certain purposes and under certain restrictions only. It was doubtless felt that to permit distilleries to be operated over the State, under a claim that the proprietors desired to make alcohol for lawful uses, rather than whiskey or alcohol for other uses, would render the

prohibition law of little effect, and that the total prohibition of such manufacture was a necessary and proper means to render efficient the general prohibition law, and to guard against the evils of intemperance. The courts cannot declare that the legislature was without this power, or that it was such an arbitrary exercise of power as to violate the provisions of the Constitution referred to in the questions propounded by the court of appeals."

In this case it was also contended that the State statute was in violation of the Fourteenth Amendment to the Constitution of the United States. This objection was overruled by the State supreme court. An appeal was taken to the Supreme Court of the United States, which was dismissed May 12, 1913, 229 U. S. 630, 57 L. Ed. 1358, 33 Su. Ct. Reporter 778, thereby indicating that the Supreme Court of the United States considered no rights guaranteed by the Constitution of the United States were infringed by this statute.

*Even where a Constitutional Amendment prohibits the sale of intoxicating liquors except for medical, scientific, and mechanical purposes the courts hold that the exceptions made cannot be construed to prevent the adequate enforcement of the prohibition against the use of such liquors for beverage purposes.* This precise question was raised in the case of *State v. Durein*, 70 Kansas, 1, 78, Pac. 152, 15 L. R. A. (N. S.) 908, 905.

In a unanimous opinion of the court delivered by Judge Burch the authorities are reviewed and the following language is used:

The amendment to the Constitution of this State already quoted does not limit or abridge the power of the legislature further to prohibit the traffic in

intoxicating liquor. It restrains the legislature in its power to tolerate only, and not in its power to suppress. The sole purpose of the exception relating to medical, scientific, and mechanical purposes is to mark the limit of the positive inhibition which is established. There is no convenient word which connotes all the purposes other than medical, scientific, and mechanical for which intoxicating liquors may be used. If such other purposes may be indicated by the word "beverage" the effect of the amendment is the same as if it simply read "The manufacture and sale of intoxicating liquors for beverage purposes shall be forever prohibited in this State." Therefore the status of the manufacture and sale of such liquors for medical, scientific, and mechanical purposes was in no manner fortified by the constitutional amendment, but it was left to be dealt with by the legislature as necessity might require, having particular regard to the complete suppression of manufacture and sale for beverage purposes."

This decision was later affirmed by the Supreme Court of the United States, January 13, 1908, 208 U. S. 613, 52 L. Ed., 645, 28 Su. Ct. Rep. 567.

In the later case of *State v. Weiss*, 84 Kans. 165, 113 Pac. 388, 36 L. R. A. (N. S.) 73, the court held:

"The constitutional amendment forever prohibiting the manufacture and sale of intoxicating liquors in this State, except for medical, scientific, and mechanical purposes, is not a restriction upon the power of the legislature to prohibit by statute. In the absence of such amendment, the legislature would possess such power, and its authority is not diminished thereby. Sections 1 and 2 of chapter 164 of the Laws of 1909 (Gen. Stat. 1909, Secs. 4361, 4362) making it unlawful to sell intoxicating liquors for any purposes, upheld."

Section 1 of the original prohibition law of Kansas read:

"Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be guilty of a misdemeanor, and punished as herein-after provided: Provided, however, that such liquors may be sold for medical, scientific and mechanical purposes, as provided in this act."

In 1909 the legislature amended this section of the statute by striking out the provision that liquors might be sold for the three excepted purposes. Judge Burch in the case of State v. Miller, 92 Kan. 994, 142 p. 979 speaking for the Supreme Court said:

"In 1909 the Legislature passed a new act which extended the prohibition of the law to the manufacture and sale of intoxicating liquors for medical, scientific, and mechanical purposes, and which superceded the old definition of intoxicating liquors."

\* \* \* \* \*

"Fear lest the law might be brought into disrepute by encroachment on the right to use preparations containing alcohol was no longer entertained. Nearly 30 years' experience disclosed that restraints, which year by year had been continually imposed, and which would have been regarded as unnecessary and unreasonable when the law was new and strange, were fit and wholesome, and were approved by public sentiment. The progress of events had been such, when the Legislature approached a revision of the law in 1909, that the intellectual, moral, social and legal atmos-

phere had become a wholly different medium from that in which the Legislature of 1881 labored.

“The legislature was not doing an idle thing by repealing one definition and substituting another. It intended to change the law, and the result is that the classification established by the intoxicating liquor cases is abrogated.”

In 1917 the Legislature of Kansas enacted the Bone Dry Law which prohibits the sale of anything save alcohol for medicinal purposes. Such sales are limited to druggists, hospitals and institutions authorized to receive. No provision is made for dispensing upon prescription. The validity of this act was before the Supreme Court of Kansas in the case of State v. Macek 104 Kan. 742, 180 P. 985, wherein Judge Dawson speaking for the court said:

“We come, then, to the last and only serious question in this lawsuit—the constitutionality of the bone dry law. Appellant says that it is unconstitutional and void, and cites many a respectable authority and precedent from Blackstone’s time down to yesterday to that effect. But they all stop yesterday! The times change. Men change, and their opinions change; their notions of right and wrong change. The United States, its government and people, have come a long, long way since the Washingtonian Society was organized in 1840 to combat intemperance. A whole generation of Americans has been born and educated, and has grown to maturity and taken its dominant place in the electorate and in official life, since instruction in the evil effects of intoxicants upon the human system became compulsory in our public schools. Laws 1885, c. 169; Gen. Stat. 1915, Sec. 9034. That is the leaven which has leavened the whole

lump. ‘Learn young, learn fair,’ is an old adage whose efficacy was never better proved than in the practical annihilation of the liquor traffic by the unnoticed but persistent work of the public schools for the last 30 years. While we of an earlier generation continued to argue the pros and cons of the liquor traffic, and the wisdom, or folly, or impossibility, of suppressing the sale and use of intoxicants a generation arrived which will have none of it; that generation has said so as clearly and emphatically as the American people ever voiced their determination on any subject since 1776. Eighteenth Amendment U. S. Const. And because of the ease with which the law prohibiting sales, etc., of liquor may be violated and the difficulty of procuring evidence of such violation, the Legislature in 1917 (chapter 215) decreed that the mere possession of intoxicants, or knowingly to permit them to be kept on one’s premises should be unlawful. Any Legislature sincerely determined to suppress the sale of liquor and to suppress the keeping of tippling nuisances would be strongly persuaded to go the final step of forbidding the mere possession of intoxicants; otherwise its laws forbidding liquor sales and the existence of drinking dens would be bound to be somewhat ineffective. The whole matter is one of public policy. And the public policy of a State must largely be shaped by legislation. No Federal or State constitutional inhibition was violated in the enactment of the bone dry law, all of yesterday’s juristic dissertations and precedents to the contrary notwithstanding.”

This decision was also followed by the subsequent case of *State v. Kurent*, 105 Kan. 13, 181 P. 603, where the constitutionality of the statute was reaffirmed. It must be borne in mind that this is the status of law in a State where the State constitutional provision reads:

"The manufacture and sale of intoxicating liquor shall be forever prohibited in this State, except for medicinal, scientific and mechanical purposes."

The legislature of Tennessee by Acts of 1909, Chap. 10, prohibited the sale of intoxicating liquor as a beverage and prohibited the manufacture of all alcoholic liquor except alcohol of 188 test. The effect of this statute was to prohibit the manufacture of all liquors except alcohol of 188% proof. No whiskey, beer, wine, or other intoxicants could be manufactured in the State no matter whether intended for medicinal, mechanical, scientific, sacramental or other purposes. The contention was made in the case of Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L. R. A. 1916 F p. 177, that this was an unjust and unreasonable discrimination against the manufacture of liquors designated for non-beverage use.

The Court held:

"No unconstitutional discrimination is made against local manufacturers in favor of those of other States, by forbidding the manufacture of intoxicating liquors within the State while permitting their sale for certain purposes, although the result is to require those sold to be secured outside the State.

"The legislature may constitutionally forbid the manufacture of intoxicating liquors within the State while permitting their sale for medicinal and other non-beverage purposes.

"There is no property right in the manufacture of intoxicating liquors which cannot be taken away under the police power of the State, although such liquors are capable of harmless use."

This case, upon appeal, was dismissed by the Supreme Court of the United States, October 8, 1915, 239 U. S. 653, 60 L. Ed. 487, 36 Sup. Ct. Rep. 161.

In 1886 Rhode Island adopted an amendment to the constitution of the State which in its wording was very similar to the language of the Eighteenth Amendment to the Constitution of the United States. In the case of State v. Kane, 15 R. I. 395, 6 Atl. 783, the question of the relation of the amendment to non-beverage liquor was before the Supreme Court of that State. It was held:

"The manufacture and sale of intoxicating liquors, to be used as a beverage, shall be prohibited. The general assembly shall provide by law for carrying this article into effect. Held, this does not limit the power the general assembly previously had to pass a prohibitory law. Held, also, this does not impliedly license the manufacture and sale of intoxicating liquors for other purposes than as a beverage."

In construing the second clause of the amendment, which conferred power upon the legislature to make the prohibition effective the Supreme Court said in that case at page 785:

"OF COURSE, IF THE GENERAL ASSEMBLY HAD PREVIOUSLY HAD NO POWER TO LEGISLATE, THIS COMMAND WOULD CONFER BY IMPLICATION THE POWER REQUIRED FOR ITS OWN EXECUTION."

While in the case the court recognized that under the police power the State would have had the power to prohibit the sale of liquors for beverage purposes in the absence of a constitutional provision it was careful to point out that even in the absence of such pre-existing authority where the right was conferred by a constitutional provision there was *conferred by necessity*.

*sary implication the power required for its execution.*

The Supreme Court of Rhode Island reaffirmed this view in the case of State v. Kennedy, 16 R. I. 409, 17 Atl. 51, wherein it was said:

"In State v. Kane, 15 R. I. 395, 6 Atl. Rep. 783, we carefully considered the point here raised, and expressed the opinion that while the fifth amendment to the constitution, commonly called the 'Prohibitory Amendment,' makes it obligatory on the general assembly to enact laws to prevent the sale of intoxicating liquors 'to be used as a beverage,' it does not take away from the general assembly either expressly or by implication, the power which it previously had to restrict the sale, for other purposes, to certain persons or classes of persons; BUT RATHER ON THE CONTRARY, MAKES IT THEIR DUTY TO IMPOSE SUCH A RESTRICTION, IF, BY SO DOING, THEY CAN THE MORE EFFECTUALLY PREVENT THE SELLING AND KEEPING FOR SALE FOR USE AS A BEVERAGE. WE REMAIN OF THE OPINION THERE EXPRESSED. EXCEPTIONS OVERRULED."

In the case of Re. Crane, 27 Idaho 671, 151 P. 1006, L. R. A. 1918 A. 942, the Supreme Court of Idaho in construing the law of that State, Session Laws 1915, Chapter 11, said:

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and PURE ALCOHOL TO BE USED FOR SCIENTIFIC OR MECHANICAL PURPOSES, OR FOR COMPOUNDING OR PREPARING MEDICINES, SO THAT THE POSSESSION OF WHISKEY, OR OF ANY INTOXICATING LIQUOR, OTHER THAN WINE

AND PURE ALCOHOL FOR THE USES  
ABOVE MENTIONED, IS PROHIBITED."

"No fixed rule has been discovered by which to determine whether or not a statute of the nature of the one under consideration is a proper exercise of the police power, but it may be said the questions propounded to the courts are: Does the statute purport to have been enacted to protect the public health, the public morals, or the public safety? Has it a real and substantial relation to those objects, or is it, upon the other hand, a palpable invasion of right secured by the Constitution? Questions as to the wisdom and expediency of such legislation address themselves to the legislative, not to the judicial branch of the government.

"We have reached the conclusion that this act is not in contravention of section 1 of the 14th Amendment to the Constitution of the United States, nor of section 13, article 1, of the Constitution of Idaho; that it was passed by the legislature with a view to the protection of the public health, the public morals, and the public safety; that it has a real and substantial relation to those objects; and that it is, therefore, a reasonable exercise of the police power of the State."

The Supreme Court of the United States, Dec. 10, 1917, sustained the validity of the statute, *Crane v. Campbell*, 245 U. S. 304, 62 L. Ed. 304, 38 Su. Ct. 98, and after repeating the language of the lower court which pointed out that the only exceptions made to the prohibitions of the statute was in the case of WINE to be used for sacramental purposes and pure ALCOHOL to be used for scientific or mechanical purposes or for compounding or preparing medicine, said:

"It must now be regarded as settled that, on account of their well-known noxious qualities and

extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the 14th Amendment; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. Ed. 989, 992; *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 91, 34 L. Ed. 620, 11 Sup. Ct. Rep. 13; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 201, 57 L. Ed. 184, 187, 33 Sup. Ct. Rep. 44; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 320, 321, 61 L. Ed. 326, 335, 336, L. R. A., 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; *Seaboard Air Line R. Co. v. North Carolina*, 245 U. S. 298, ante, 299, 38 Sup. Ct. Rep. 96.

\* \* \* \* \*

"As the State has the power above indicated to prohibit it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. \* \* \* And considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

The *CONSTITUTION* of one State, that of *ARIZONA*, as construed by the Supreme Court of that State prohibits the prescribing of either alcohol or any form of intoxicating liquors. Article XXIII of the Constitution of Arizona was construed by the Supreme Court of that State in the case of *Cooper v. State*, 172 Pac. 276. The court said:

"The Constitution forbids the sale and disposition of ardent spirits, ale, beer, and wine and of intoxicating liquors of any kind to any person in the State of Arizona. Article 23, Constitution. IT CONTAINS NO EXCEPTIONS, AS THAT IT MAY BE PRESCRIBED AND SOLD AS A MEDICINE OR FOR MEDICINAL PURPOSES. Neither doctors nor druggists, nor any one else may sell or dispose of any of the named or described liquors as such, or when compounded as a medicine. It is not a regulatory provision, but one of outlawry. It is one of suppression and not one of supervision. The fact that ardent spirits are mixed with other ingredients, and, as thus compounded, labeled, Jamaica Ginger and sometimes used for medicinal purposes, does not change the situation."

The entire question of the right to prohibit or regulate the prescribing of liquors for medicinal purposes, including the validity of the provisions of the National Prohibition Act, has just been the subject of a careful review by the District Court of Appeals for the Second District of California in the case of *Ex parte Hixson*, 214 Pae. 677, decided February 28, 1923.

In conclusion, in sustaining the validity of the limitation of the city ordinance and the National Prohibition Act, the court said:

"\* \* \* We think that the ordinance would not have been unreasonable and void if it had entirely prohibited the sale of alcoholic liquor as a medicine. And if the city possessed the power entirely to prohibit its sale as a medicine, then a fortiori, the limitation to eight ounces in ten days, would not have been an unreasonable restriction.  
\* \* \* Concluding as we do, that the city of Los Angeles, had it chosen to exercise the power might

have prohibited in the first instance all sales of alcoholic liquor as a medicine, it cannot be held that the city's restriction upon the filling of prescriptions by pharmacists has been so far augmented by the National Prohibition Law that it has now become unreasonable and void."

There is no inherent right to manufacture, sell or prescribe malt liquors for medicinal purposes. This is shown by the exhibit appended containing a summary of the laws of the several states relating to the prescription of liquors. (P. 59.) In twenty-nine out of the forty-eight States of the Union, namely, Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Maine, Iowa, Kansas, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Tennessee, Utah, Washington, and West Virginia, no form of malt liquor may be prescribed. While in four of the remaining States, namely, Colorado, Michigan, Minnesota and Virginia the quantity of intoxicating liquor which may be prescribed under the provisions of State law is so small as to indicate that it was not contemplated by the legislative body that malt liquors should be sold or prescribed for medicinal purposes.

In California, Connecticut, Kentucky, New Jersey, Rhode Island and Wisconsin the statutes have been enacted or amended to conform to the Federal Law, which prohibits the manufacture, sale or prescription of malt liquors for medicinal purposes. Adding these to the twenty-nine States referred to above makes a total of thirty-five States where prohibition upon the prescribing of malt liquors obtains as a result of State legislative action.

The States of Massachusetts, Maryland, Nevada and New York have no State prohibition laws and therefore have no legislation upon the subject except in localities where local option statutes may be in force.

From the appended exhibit it will be noted that not only is the prescribing of malt liquors prohibited, but that in *twelve* States, Arizona, Idaho, Maine, New Mexico, North Dakota, Georgia, Kansas, Nebraska, North Carolina, Utah, Washington, West Virginia, *no intoxicating liquor of any kind may be prescribed*, while in *eleven* States, Alabama, Arkansas, Delaware, Florida, Indiana, Mississippi, Oklahoma, Oregon, South Carolina, Tennessee, Texas, pure *alcohol only* may be prescribed.

The power of the States to regulate the sale of liquors for medicinal purposes, to permit the sale of some forms and to prohibit others, has been sustained by the courts as a constitutional exercise of legislative authority to make effective their prohibitory laws.

#### THE POWER OF CONGRESS TO EFFECTIVELY PROHIBIT THE MANUFACTURE AND SALE OF BEVERAGE LIQUORS UNDER THE EIGHTEENTH AMENDMENT IS AS FULL AND COMPLETE AS THE POLICE POWER OF THE STATES TO ENFORCE SUCH PROHIBITION.

The character and extent of the power conferred upon Congress by the Eighteenth Amendment was the precise issue before the Supreme Court in the National Prohibition Cases, 253 U. S. 350.

The Eighteenth Amendment prohibits the manufacture and sale of intoxicating liquors. Congress in the National Prohibition Act had defined that term to in-

clude beverages containing as much as one-half of one per cent of alcohol by volume. It was insisted that the statute prohibited the manufacture and sale of beverages which were not in fact intoxicating and that because of this the statute was unconstitutional. The court held:

“Congress did not exceed its powers under U. S. Const., 18th Amend., to enforce the prohibition therein declared against the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, by enacting the provisions of the Volstead Act of October 28, 1919, wherein liquors containing as much as one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power.”

It was also insisted that Congress had exceeded the authority conferred by the Amendment by making the prohibition apply to liquors manufactured prior to the date upon which the Amendment became effective. The court said:

“The power of Congress to enforce the Prohibition Amendment to the Federal Constitution may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes.”

Even prior to the granting of an *express constitutional* power over the subject of intoxicating liquors, when Congress legislated upon the subject as an incident of some other constitutional power, full authority was possessed to make the power effective and the fact that such legislation had the character

of a police regulation was no objection to its validity. In the case of *Ruppert v. Caffey*, 251 U. S. 264, the Supreme Court held:

"The implied war power of Congress over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectively prevent their sale. \* \* \* When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend an exercise by a State of its police power."

The attempted distinction between the character of the power possessed by the States over the subject of intoxicating liquor in the exercise of the police power and the nature of the power possessed by Congress under the Eighteenth Amendment is fundamentally unsound.

The regulations and prohibitions upon the medicinal use imposed by State law are the exercise of police power. The police power over intoxicating liquor is a single broad power to prevent the evils consequent upon their abuse and is not divisible into two component elements of a police power over the beverage use and a separate police power over the medicinal use. It is a single power sufficiently comprehensive to include in its exercise control and regulation over all the means thru which the evil at which it is directed may come into existence.

To prevent the beverage use the States found it necessary to regulate or prohibit the medicinal use. The Eighteenth Amendment was designed to prevent the same evil and to unite with the power of the

States the power of the Federal government. The nature of the power conferred upon the Federal government by the Amendment is of the same character as that possessed by the States.

Mr. Justice Brandeis in the case of *Ruppert v. Cafey*, 251 U. S. 264, 299, clearly and succinctly stated this proposition when he said:

“The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors, supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors.”

The duty of enforcing this prohibition against the traffic in intoxicating liquors for beverage purposes which was imposed upon Congress by the Eighteenth Amendment carries with it the full power to do all things necessary for its accomplishment. *U. S. v. Rhodes*, 1 Abb. U. S. 28; *Civil Rights Cases*, 109 U. S. 3; *U. S. v. Cruikshank*, 1 Woods 308.

Section 2 of the Eighteenth Amendment to the Constitution of the United States provides, among other things, that Congress and the several States shall have concurrent power to enforce this Article by “appropriate legislation.” “Appropriate legislation” as used in this section necessarily means such legislation as will tend to make this constitutional provision completely operative and effective.

The power conferred upon Congress by Section 2 of the Eighteenth Amendment is plain in its nature and commits to Congress the discretion to determine

the legislation necessary and appropriate to enforce the provisions of Section I of this constitutional amendment. Unless the enactment has no substantial relation to the enforcement of the constitutional prohibition of the manufacture, sale or transportation of intoxicating liquors for beverage purposes, a court has no power to determine the wisdom of the enactment or challenge the manner of the exercise by Congress of the authority and discretion confided to it by the second section of this constitutional amendment.

The authority to enact "appropriate legislation" conferred upon Congress by the Eighteenth Amendment to enforce the provisions of the Amendment very obviously means such legislation as will completely and effectively suppress what the Amendment treats as a public evil, to-wit, the traffic in intoxicating liquors for beverage purposes. *Rhode Island v. Palmer*, 253 U. S. 350; *Corneli v. Moore*, 257 U. S. 491; *Grogan v. Walker*, 259 U. S. 80; *Hoke v. U. S.*, 227 U. S. 309; *Gloucester Co. v. Pa.*, 114 U. S. 196; *Champion v. Ames*, 188 U. S. 321; *U. S. v. Ferger*, 250 U. S. 199; *U. S. v. Doremus*, 249 U. S. 86.

Congress, having been given full authority to make complete and effective the constitutional prohibition against the traffic in and the use of intoxicating liquors for beverage purposes, may very properly deem it wise to place limitations upon the use of intoxicating liquors and even prevent use of certain specified liquors for medical purposes so as to prevent the sale of such liquors for beverage purposes, as it is well known that the unrestrained traffic in liquor for alleged medicinal purposes results in great abuses and serves as a ready means of defeating the constitu-

tional prohibition against the use of same for beverage purposes.

As the power to completely and effectively prohibit the traffic in and use of intoxicating liquor for beverage purposes has been conferred upon Congress, to deny it the right to regulate the use of such liquor for non-beverage purposes or even absolutely forbid the use of certain such liquors for non-beverage purposes, might well destroy the power of Congress to enforce the prohibition in the Eighteenth Amendment against intoxicating liquors for beverage purposes. It is submitted that no such situation is contemplated by the Eighteenth Amendment.

On the contrary the power to make effective the constitutional prohibition against the traffic in intoxicating liquors for beverage purposes very obviously includes, if that power is to exist, the power to deal with abuses and obstructions to the constitutional prohibition such as the procuring of intoxicating liquors ostensibly for medicinal purposes but designed and intended for use for beverage purposes.

Congress in the exercise of its power has merely imposed such safeguards upon the use of intoxicating liquors by druggists and physicians as to render the exercise of its constitutional power to prohibit the traffic in intoxicating liquors for beverage purposes effective and operative. The object of the Act approved November 23, 1921, was not to regulate or restrict the calling of physicians or druggists nor in fact to prevent the use of intoxicating liquors for non-beverage purposes, but to regulate an abuse of, and to put an end to obstructions to, the general prohibition of the use of intoxicating liquors for beverage purposes, as contained in the Eighteenth Amendment and the National Prohibition Act.

## THE RIGHT TO MANUFACTURE, SELL OR POSSESS INTOXICATING LIQUORS IS NOT AN INHERENT RIGHT OF CITIZENSHIP.

This is definitely settled by the decisions of the Supreme Court. See Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929; Mugler v. Kansas, 123 U. S. 123, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346; Giozzi v. Tiernan, 148 U. S. 657, 37 L. Ed. 599; Barbour v. Georgia, 249 U. S. 454, 39 Su. Ct. Rep. 20, 63 L. Ed. 704; Crane v. Campbell, 245 U. S. 304, 62 L. Ed. 304.

## THERE IS NO INHERENT RIGHT TO PRACTICE MEDICINE WHICH IS NOT SUBORDINATE TO THE POLICE POWER.

This is well settled by the decisions of the United States Supreme Court. In Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 626, 9 Su. Ct. Rep. 231, Mr. Justice Field said in speaking of the validity of the West Virginia statute providing a license and fixing the conditions upon which physicians might practice:

"\* \* \* But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. \* \* \* The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. \* \* \* The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered or a

more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected."

In *Gray v. State of Connecticut*, 159 U. S. 74, 40 L. Ed. 80, Mr. Justice Field in speaking for the Supreme Court in sustaining the validity of a liquor law which imposed additional qualifications upon a pharmacist already holding a license to practice pharmacy, said:

"A license to pursue any business or occupation from the governing authority of any municipality or State, can only be invoked for the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected by existing or new conditions. The degree of care and scrutiny which should attend the pursuit of the business or occupation practiced will necessarily depend upon the safety and freedom from injurious or dangerous conditions attending the prosecution of the same.

"In the preparation of medicinal compounds, intoxicating liquors and even still more dangerous ingredients are often properly used; but the protecting care of the government, municipal or State, in their use, should never be relaxed beyond the bounds of absolute safety. The responsibility of the legal authority, municipal or State, cannot be stipulated or bartered away. Whatever provisions were prescribed by the law previous to 1890 in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful.

"For reasons which were deemed sufficient after 1890 by the authorities of Connecticut, the use of

spirituous liquors in the preparation of pharmacists' compounds required still further provisions than those previously existing, and it was provided that such liquors could not be subsequently used in their preparation without the pharmacist first procuring a druggist's license from the county commissioners.

"The imposition by the court of a fine upon the accused for a disregard of this requirement trespassed in no way upon any of his rights under the Constitution of the State or the 14th Amendment of the Federal Constitution."

In *Watson v. Maryland*, 218 U. S. 172, 54 L. Ed. 987, Mr. Justice Day said in sustaining the statute of Maryland relating to the practice of medicine:

"\* \* \* The details of such legislation rest primarily within the discretion of the State legislature. It is the law-making body, and the Federal courts can only interfere when fundamental rights guaranteed by the Federal Constitution are violated in the enactment of such statutes."

See also *Reetz v. Michigan*, 188 U. S. 503, 47 L. Ed. 563; *Williams v. Arkansas*, 217 U. S. 77, 54 L. Ed. 673; *O'Neil v. State*, 115 Tenn. 427, 90 S. W. 27, 3 L. R. A., N. S. 762; *State v. Davis*, 194 Mo. 485, 92 S. W. 484, 4 L. R. A., N. S. 1023; *State v. Rosenkrans*, 30 R. I. 374, 75 Atl. 491, affirmed 56 L. Ed. 1263; *State v. Edmunds*, 127 Iowa 333, 101 N. W. 431.

CONGRESS PRIOR TO THE EIGHTEENTH AMENDMENT PROHIBITED THE INTRODUCTION OF LIQUORS INTO THE INDIAN COUNTRY. THESE ACTS CONTAINED NO EXCEPTIONS PROVIDING FOR MEDICINAL USE. THE ALASKA PROHIBITION LAW PERMITS ALCOHOL ONLY FOR MEDICINAL USE.

For the provisions relative to Indian lands see 3 Fed. Stat. Ann., 2nd edition, pages 913-924. The constitutionality of these acts has been sustained by the Supreme Court of the United States.

In *Perrin v. United States*, 232 U. S. 478, 58 L. Ed. 691, 694, the Supreme Court said:

“The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt.”

In *Hallowell v. United States*, 221 U. S. 317, 55 L. Ed. 750, it was held that a conviction would lie for introducing liquor into the Indian country notwithstanding the defendant was a citizen of the United States and entitled to rights, privileges and immunities of such citizen.

See also *Ex parte Webb*, 255 U. S. 663, 56 L. Ed. 1248; *United States Express Co. v. Friedman*, 191 Fed. 673; *Joplin Mercantile Co. v. U. S.*, 236 U. S. 531, 59 L. Ed. 705; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846.

In the case of *United States v. Cohn*, the Court of

Appeals of Indian Territory (52 S. W. Rep. 38, 2 Ind. Terr. 474), had before it the duty of interpreting the Federal statute which forbade the sale within the Territory of a non-intoxicating liquor known as Rochester Tonic. The opinion at length discussed the right of the States in the exercise of their police power to prohibit the sale of such beverages and decided that whatever the States may do in that behalf Congress may do for the Territories. Since the adoption of the Eighteenth Amendment this same power is in Congress for all of the United States. After quoting the statute at length, the court said:

“No one can carefully read this statute, but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect a complete, an impregnable barrier against the introduction, sale, and use of intoxicating liquor in all of its forms, and to guard against all of the well known subterfuges resorted to deceive courts and juries in relation to the matter.”

See also Alaska Prohibition Statute, Act of February 14, 1917, ch. 53, 39 Stat. at L. 903.

#### **THE POWER TO PROHIBIT THE MANUFACTURE OR PRESCRIBING OF LIQUOR ABSOLUTELY BEING ESTABLISHED IT NECESSARILY INCLUDES THE LESSER POWER TO PERMIT CONDITIONALLY.**

The cases hereinbefore cited clearly establish the proposition that the States and Congress in order to effectuate the prohibition upon the beverage use may prohibit absolutely the manufacture or prescribing of

malt liquors for medicinal purposes. The power to prohibit absolutely the prescribing of certain forms of intoxicating liquors for medicinal use, when in the legislative judgment such prohibition is necessary for effective enforcement of the prohibition upon the beverage use, necessarily includes the lesser power to permit conditionally the prescribing of other forms of intoxicating liquors for medicinal purposes upon such conditions as the legislative body may deem necessary to effectively prohibit the beverage use. Such restrictions are valid. Both the 66th and 67th Congress regarded the prohibitions of the Federal prohibition statute relating to the prescribing of spirituous liquor and limiting the quantity which could be prescribed to one pint within ten days as both necessary and reasonable for the effective enforcement of the Eighteenth Amendment. Section 7 of the National Prohibition Act, as originally enacted, provided that not more than a pint of spirituous liquors, to be taken internally, should be prescribed for use by the same person within any period of ten days, and that such prescription should not be refilled. The same limitation was continued by the 67th Congress in Section 2 of the Supplemental Prohibition Act upon spirituous liquors, and extended in its application to the prescribing of vinous liquors.

The appellants cannot claim successfully that the Federal prohibition statutes which prohibit absolutely the prescribing of malt liquors but permitted the prescribing of vinous and spirituous liquors within the defined limitations constitutes an unjust discrimination against them. It is competent for the legislative body to fix the conditions necessary to effect the constitutional purpose, and the power to prohibit absolutely carries with it the power to permit conditionally.

This was the precise issue before the United States Supreme Court in the case of Clark Distilling Company v. Western Maryland R. Co., 242 U. S. 311, 61 L. Ed. 326. The facts in this case were that Congress, in the exercise of its power to regulate commerce among the States had enacted the Webb-Kenyon Law which provides:

“ \* \* \* That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, territory, or district of the United States, \* \* \* into any other State, territory, or district of the United States, \* \* \* which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, territory, or district of the United States \* \* \* is hereby prohibited.”

It was insisted in this case that while Congress had the power to prohibit the facilities of interstate commerce absolutely to the transportation of intoxicating liquor, nevertheless, it had exceeded its powers by prohibiting conditionally or by leaving the determination of whether such prohibition should apply, to the States. Mr. Chief Justice White in this case said that there was absolutely no doubt about the power of Congress to prohibit the transportation absolutely under its constitutional authority to *regulate* commerce. Upon this subject he said:

“ It is not in the slightest degree disputed that if Congress had prohibited the shipment of all in-

toxicants in the channels of interstate commerce, and therefore had prevented all movement between the several States, such action would have been lawful, because within the power to regulate which the Constitution conferred. *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 13 Am. Crim. Rep. 561; *Hoke v. United States*, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913-E, 905."

In refuting the contention that the law was unconstitutional because Congress had not prohibited absolutely but merely conditionally, the Chief Justice said:

"We can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power."

The Chief Justice then declared that the exceptional nature of the subject treated was the justification for the action of Congress. He said:

"The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the

Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

Ohio ex rel. Lloyd V. Dollison, 194 U. S. 445, 48 L. Ed. 1062, 24 Sup. Ct. Rep. 703; Rippey v. Texas, 193 U. S. 504, 48 L. Ed. 767, 24 Sup. Ct. Rep. 516; Southern Exp. Co. v. State, 188 Ala. 454, 66 So. 122; American Exp. Co. v. Beer, 107 Miss. 528, 65 So. 581, Ann. Cas. 1916D, 127; State v. United States Exp. Co., 164 La. 112, 145 N. W. 451; State v. Doe, 92 Kan. 212, 139 Pac. 1170.

Every form of regulation implies a partial prohibition. The decisions of the State courts sustained by the United States Supreme Court clearly establish the right of a legislative body to prohibit absolutely the medicinal use of liquor in order to prevent the evils of the beverage use. The State statutes to this effect have been uniformly upheld. The power of Congress under the Eighteenth Amendment to make effective the prohibition upon the beverage use is no less than that of the State in the exercise of their police power. Merely because Congress has not seen fit to exert that power by laying an entire prohibition upon the prescribing of spirituous or vinous liquors for medicinal use but has seen fit to impose limitations not amount-

ing to a complete prohibition constitutes no valid constitutional objection to the provisions of the statute.

The characteristics of intoxicating liquor are such that it lends itself peculiarly to evasion of the law. It was both reasonable and necessary, if its sale was to be permitted for medicinal use, that regulations and conditions upon such use be imposed. The experience in the States demonstrated this. Because of this fact in nearly every State adopting prohibition prior to national prohibition the prescribing of liquor has been either prohibited altogether or limited to pure alcohol only.

**LEGISLATIVE ACTS ARE PRESUMED CONSTITUTIONAL. IN THE EXERCISE OF ITS POWER TO EFFECT A CONSTITUTIONAL PURPOSE CONGRESS IS THE JUDGE OF THE MEANS TO BE EMPLOYED AND THE NECESSITY WHICH OCCASIONS ITS EMPLOYMENT.**

It is well settled that statutory enactments, solemnly enacted by the legislative branch of the Government, are presumed to be constitutional, and the burden of proving any particular statute to be unconstitutional is upon the party attacking such statute. Every reasonable presumption will be made in favor of the validity of the statute and the statute will be upheld by the courts unless it is clearly shown to be unconstitutional; it has even been held that a Federal Statute will not be declared void by the courts unless it appears, *beyond a reasonable doubt*, that it is not within the constitutional power of Congress. See the case of the United States v. United Shoe Machinery Company, 234 Fed. 127, 143, wherein the court said:

"It is a well settled rule that the courts are slow to declare the acts of co-ordinate departments of the Government void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States, the courts will uphold it."

See also the case of Interstate, etc., Railway Co. v. Mass., 207 U. S. 79, wherein the court, acting through Mr. Justice Holmes said:

"It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of a real doubt, a law must be sustained."

In the case of Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 64 L. Ed. 194, in construing the War Prohibition Act, it was held:

"The Federal Supreme Court may not, in passing upon the validity of a Federal Statute, inquire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed."

In Mugler v. Kansas, 123 U. S. 123, 31 L. Ed. 205, 210, it was said:

"\* \* \* If in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. \* \* \*"

In the case of *Fong Yue Ting v. United States*, 149 U. S. 698, the court said:

"In exercising the great powers which the people of the United States by establishing a written Constitution as a supreme law of the land have vested in this court of determining, whenever the question is brought before it, whether the acts of the Legislature or Executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government."

No principle of constitutional law is more firmly established than that the courts may not, in passing upon the validity of a statute inquire into the motives of Congress. *United States v. Des Moines Company*, 142 U. S. 510; *McCray v. United States*, 195 U. S. 27; *Weber v. Freed*, 239 U. S. 325; *Dakota T. Company v. South Dakota Company*, 250 U. S. 163.

Nor will the court inquire into the wisdom of the legislation. *McCulloch v. Maryland*, 4 Wheat. 316; *Gibbons v. Ogden*, 9 Wheat. 1; *Brushaber v. Union Pacific Railroad Co.*, 240 U. S. 1; *Rast v. Van Deman Company*, 240 U. S. 342.

Nor will the court pass upon the necessity for the exercise of a power possessed by the Legislature. *Champion v. Ames*, 188 U. S. 321.

In 1804 Chief Justice Marshall, in the case of *United States v. Fisher*, 2 Cranch. 358, in considering the powers conferred upon Congress by Article I, Section 8, Chapter 18, providing that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,"

conferred by the Constitution laid down the fundamental law as follows:

"In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

"Where various systems might be adopted for that purpose it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

In 1816, Mr. Justice Story in the case of Martin v. Hunter, 1 Wheat. 304, in speaking of the Constitution, said :

"The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modification of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interest should require."

In 1819, Chief Justice Marshall in the case of McCulloch v. Maryland, 4 Wheat. 316, said:

"But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. \* \* \*

"But where the law is not prohibited and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the lines which circumscribe the judicial Department, and to tread on legislative ground. This court disclaims all pretension to such a power."

In this connection see also the following cases: Veazie Bank v. Fenno, 75 U. S. 533; Stewart v. Kahn, 78 U. S. 493.

In the legal tender cases, Knox v. Lee, 79 U. S. 457, which involved the constitutional power of Congress to pass the legal tender acts, the court said:

"Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the Government, not appropriate in any degree (for we are not judges of the degree of appropriateness) or we must hold that they were prohibited."

In the case of McCrary v. United States, 195 U. S. 27, in which the Oleomargarine Act of 1886 making the manufacture of artificially colored oleomargarine subject to a special tax was before the court for consideration, Mr. Chief Justice White said:

"The decisions of this court from the beginning lend no support whatever to the assumption that the Judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. \* \* \*

"The Judicial Department cannot prescribe to the Legislative Department limitations upon the exercise of its acknowledged powers.

"In determining whether a particular Act is within a granted power its scope and effect are to be considered; applying this rule to the Acts assailed it is self-evident that on their face they levy an excise tax; that being the necessary scope and effect it follows that the Acts are within the grant of power."

#### THE FIFTH AMENDMENT IMPOSES NO GREATER LIMITATION UPON CONGRESS THAN THE FOURTEENTH AMENDMENT DOES UPON THE STATES.

In Hamilton v. Kentucky Distilleries Company, 251 U. S. 146, 156, 64 L. Ed. 194, 199, Mr. Justice Brandeis said:

"But the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon State power. (Re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519, 524, 10 Su. Ct. Rep. 930; Carroll v. Greenwich Ins. Co., 199 U. S. 401, 410, 50 L. Ed.

246, 250, 26 Su. Ct. Rep. 66.) If the nature and conditions of a restriction upon the use or disposition of property are such that a State could, under the police power, impose it consistently with the Fourteenth Amendment, without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

**THE EVIL SOUGHT TO BE PREVENTED BY THE EIGHTEENTH AMENDMENT IS THE SAME AS THAT SOUGHT TO BE PREVENTED BY THE STATES IN THE EXERCISE OF THEIR POLICE POWER. IF THE SUBJECT OF LEGISLATION BE DEBATEABLE THE LEGISLATURE IS ENTITLED TO ITS OWN JUDGMENT.**

The United States Supreme Court in the case of *Ruppert v. Caffey*, 251 U. S. 264, 64 L. Ed. 260, said:

"That the Federal government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the States, is obvious."

The evidence before the Judiciary Committee of Congress at the time the measure was being considered, the debates when the measure was on its passage, the figures showing the number of physicians who prescribed liquors, the provisions of the Constitutions and statutes of the States having prohibition prior to the adoption of the Eighteenth Amendment are strongly indicative that the overwhelming weight of

sentiment among the members of the medical profession is that malt liquors are not a necessary therapeutic agent.

Giving the utmost consideration to the expressions of the number of those who regard malt liquor as necessary for medicinal use, the best that can be said is that the matter is a debatable question. The United States Supreme Court has repeatedly held that whenever the evidence showed the subject of legislation enacted in pursuance of a constitutional power to be debatable that the court would not interfere with the judgment of the legislative body.

In the case of *Price v. Illinois*, 238 U. S. 447, 59 L. Ed. 1400, the Supreme Court had under consideration the pure food statute of Illinois prohibiting the sale of adulterated foods. The violation charged consisted of a sale, in Chicago, of a preservative compound known as "Mrs. Price's Canning Compound" alleged to be intended as a preservative of food and to be unwholesome and injurious in that it contained boric acid. The defense was made that the compound was an article of commerce, that it was properly labeled and that it was not injurious to health; that because of this the statute of Illinois, as construed by the court of that State which prohibited its sale, was a violation of the Fourteenth Amendment and of the Commerce Clause of the Constitution of the United States. Mr. Justice Hughes speaking of the power of the legislature to determine whether a commodity was a legitimate article of commerce or sufficiently injurious to require the exercise of the police power of the State, said:

"The contention of the plaintiff in error could be granted only if it appeared that by a consensus

of opinion the preservative was unquestionably harmless with respect to its contemplated uses; that is, that it indubitably must be classed as a wholesale article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizens. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided."

In the case of Hebe Company v. Shaw, 248 U. S. 294, 63 L. Ed. 255, Mr. Justice Holmes, in speaking for the court in the opinion sustaining the validity of the Ohio statute prohibiting the sale of skimmed milk, said:

"If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, upon the issue which the legislature has decided.' Price v. Illinois, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405, 35 Sup. Ct. Rep. 892; Rast v. Van Denman & L. Co., 240 U. S. 342, 357, 60 L. Ed. 679, 687, L. R. A., 1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455."

See also Central Lumber Company v. South Dakota, 226 U. S. 164, 57 L. Ed. 167; Keokee Consolidated Coke Company v. Taylor, 234 U. S. 224, 58 L. Ed. 1288; Erie Railroad Company v. Williams, 233 U. S. 685, 58 L. Ed. 1155; Armour Company v. North Dakota, 240

U. S. 510, 60 L. Ed. 771; *Rast v. Van Deman & Lewis Company*, 240 U. S. 342, 60 L. Ed. 679, 687.

THE EIGHTEENTH AMENDMENT CONFERRED  
NO NEW RIGHT TO MANUFACTURE OR  
PRESCRIBE INTOXICATING LIQUORS.

Such rights as were possessed in this respect were guaranteed by prior provisions of the Constitution. Similar statutes of Congress and of the States prohibiting or regulating the manufacture or prescribing of liquors have been held not violative of any pre-existing constitutional right. It must follow that the National Prohibition Act and Supplemental Prohibition Act enacted pursuant to the Eighteenth Amendment constitute a valid exercise of constitutional power to effect a like purpose and cannot be declared unconstitutional without thereby in effect overruling all former decisions and invalidating all constitutions, statutes and ordinances providing similar or more restrictive regulations upon the manufacture or prescribing of liquor for medicinal purposes.

CONGRESS INVESTIGATED THE ALLEGED  
THERAPEUTIC PROPERTIES OF BEER.  
THE OVERWHELMING TESTIMONY OF  
PHYSICIANS, DRUGGISTS AND BREWERS  
SHOW THAT BEER HAD NO MEDICINAL  
VALUE.

See Prohibition legislation 1921, hearing before Committee of the Judiciary of the House of Representatives on H. R. 5033, Serial No. 2, May 12, 13, 16, 17, 20, 1921.

On pages 12 to 15 appears a petition in the following words signed by one hundred eminent physicians and scientists:

"The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopoeia as official medicinal remedies. They serve no medical purpose which cannot be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of alcoholic liquor."

See also the petition of over 400 leading physicians of the State of Massachusetts, pages 316 to 325.

Also petition of leading physicians of State of Indiana, page 324.

Also following action by the Ohio State Medical Association, page 138:

"The Ohio State Medical Association, representing 4,500 regular physicians endorses overwhelmingly the prohibition of the liquor traffic for beverage purposes, and can see no excuse for the use of beer or other malt liquors as medical remedies. Personally, as a teacher in a medical school I have taught for years that any supposed indications for their use could be satisfactorily met in other ways.

"J. H. J. UPHAM,

"Chairman Committee on Public Policy and Legislation, Professor of Medicine, Ohio State University."

See also exhibit showing that out of 152,627 physicians in the United States 78% had not taken out permits to prescribe any form of intoxicants. Page 15.

See also testimony of Dr. Harvey Wiley, former President of the United States Pharmacopoeia Convention. Pages 296 to 301.

Also testimony of Doctor Howard A. Kelly, Emeritus Professor, Johns Hopkins University, Baltimore, Md. Pages 97 to 99.

Also testimony of Dr. James M. H. Rowland, formerly Professor of Obstetrics, University of Maryland, pages 99 to 104.

The attitude of the druggists is shown by the following as submitted by the executive committee of Nat'l Ass'n of Retail Druggists, page 15:

"The executive committee of the National Association of Retail Druggists of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors have never been listed in the United States Pharmacopoeia as official medicinal remedies.

"Attest:

"SAMUEL C. HENBY, *Secretary.*"

See also the attitude of the druggists of northern Ohio set forth on page 10 of the report of the hearing.

Mr. Oliver T. Remmers, attorney for Anheuser-Busch Company of St. Louis, one of the largest breweries in the United States, said on page 40:

"As Attorney for Anheuser-Busch (Inc.) of St. Louis, formerly the largest manufacturer of beer in the world, without relinquishing the principles we have always maintained, I am authorized to speak in favor of the enactment of this amendment forbidding the manufacture and sale of beer for medicinal purposes for the following vital and fundamental reasons:

"Authorization of the sale of beer for medicinal purposes, under the provisions of the present enforcement act, will make it absolutely impossible to enforce the prohibition laws. \* \* \*"

Only one physician appeared before the Committee in advocacy of beer as a medicine. See his testimony on page 58. His attitude was repudiated by the Medical Society of the State of New York; see telegram on page 325.

Reports to the Prohibition Unit in the Treasury Department show that retail druggists throughout the country filled 11,268,469 physicians' official prescriptions for liquor during the fiscal year ended June 30, 1923.

*Of the total number of prescriptions, New York issued 3,638,751 and Illinois issued 2,168,788. The total number of prescriptions issued in these two states was 5,807,539 compared with 11,268,469 for the entire country, or one-half of the total number.* Furthermore, there are approximately 16,500 physicians in the State of New York. According to departmental reports only 9,038 hold permits to prescribe liquors. This is approximately 54 per cent of the total number of physicians in the State. A corresponding proportion obtains in Illinois. *This would indicate that 54 per cent of the physicians in these two States issued one-half of all the prescriptions in the United States for medicinal liquor during the last year.*

The total quantity of whiskey sold on prescription throughout the country was 1,347,573 gallons. In New York 442,996.24 gallons of whiskey were sold on prescription; in Illinois 269,070.20 gallons were sold. In other words, 54 per cent of the physicians in these two States, containing 15 per cent of the population, pre-

scribed a total of 712,066.44 gallons of whiskey as compared with a total of 1,347,573 gallons for the entire country. *This indicates that 54 per cent of the physicians in these two States prescribed more than half or 52 per cent of all the whiskey used for medicinal purposes in the country during the year.*

This reveals the fact that the Federal prohibition act does not unduly hamper the issuing of prescriptions for intoxicating liquor. It also proves beyond the question of a doubt that if these limitations are invalid, and similar state limitations void, as declared by opposing counsel, it would furnish the means and the device by which the purpose of the Eighteenth Amendment could be subverted.

### CONCLUSION

The Eighteenth Amendment conferred no right to manufacture or prescribe liquor for medicinal purposes. Twenty-nine States have by their constitutions or statutes prohibited the manufacture or prescribing of malt liquors for medicinal purposes. Congress in legislating with reference to the territories and Indian lands had prohibited such use prior to the Eighteenth Amendment because experience had shown such prohibition to be necessary to effectively prevent the beverage use, and these statutes have been sustained by the courts as not violative of any constitutional right.

It is therefore respectfully submitted that it cannot be said that the provisions of the Supplemental Prohibition Act, enacted for the enforcement of the Eighteenth Amendment to the Constitution, and which prohibits absolutely the manufacture or prescribing of malt liquors for medicinal purposes, are either arbitrary or unreasonable or without proper relation to the

constitutional purpose, especially in view of the overwhelming weight of the testimony of the physicians who would have the privilege of prescribing such liquors, the druggist who would have the privilege of selling them and the brewers who would have the privilege of manufacturing them, to the effect that beer is not a medicine. For these reasons the judgment in these cases should be affirmed.

HARWELL G. DAVIS, Attorney General, Alabama,  
J. S. UTLEY, Attorney General, Arkansas,  
RIVERS BUFORD, Attorney General, Florida,  
EDWARD J. BRUNDAGE, Attorney General, Illinois,  
U. S. LESH, Attorney General, Indiana,  
BEN J. GIBSON, Attorney General, Iowa,  
CHAS. B. GRIFFITH, Attorney General, Kansas,  
THOMAS B. McGREGOR, Attorney General, Kentucky,  
RANSFORD W. SHAW, Attorney General, Maine,  
ANDREW B. DOUGHERTY, Attorney General, Michigan,  
CLIFFORD L. HILTON, Attorney General, Minnesota,  
JESSE W. BARRETT, Attorney General, Missouri,  
CLAYTON D. POTTER, Attorney General, Mississippi,  
WALLINGTON D. RANKIN, Attorney General, Montana,  
O. S. SPILLMAN, Attorney General, Nebraska,  
MILTON J. HELMICK, Attorney General, New Mexico,  
GEORGE F. SHAFER, Attorney General, North Dakota,  
C. C. CRABBE, Attorney General, Ohio,  
GEORGE F. SHORT, Attorney General, Oklahoma,  
I. H. VAN WINKLE, Attorney General, Oregon,  
GEORGE W. WOODRUFF, Attorney General, Pennsylvania,  
BUELL F. JONES, Attorney General, South Dakota,  
FRANK M. THOMPSON, Attorney General, Tennessee,  
E. T. ENGLAND, Attorney General, West Virginia,  
DAVID J. HOWELL, Attorney General, Wyoming,

*Attorneys, Amici Curiae.*

## APPENDIX

**A BRIEF SUMMARY OF PROVISIONS OF THE LAWS OF THE SEVERAL STATES RELATING TO PRESCRIBING INTOXICATING LIQUOR.****ALABAMA:**

Pure alcohol only may be prescribed in a quantity not to exceed one-half pint upon a single prescription. Physicians desiring to prescribe alcohol must make an affidavit before the judge of the probate court of the county in which said physician practices, stating that he is duly licensed practitioner and that he will prescribe alcohol in accordance with the provisions of the law which are set forth in the affidavit required to be filed. For this a fee of twenty-five cents is allowed the clerk receiving the affidavit. Prescriptions must be written in accordance with a form prescribed by statute. They must contain the name and address of the physician, the name and address of the patient, the date of issuance and the number of like prescriptions written for the same patient within the preceding twelve months, the disease or malady from which the patient is suffering and set forth the quantities of dose and method of use or administration. Such prescriptions may be issued only after an actual examination of the patient and a copy signed by the physician must be immediately filed with the probate judge who shall preserve the same and deliver all such prescriptions to the next grand jury for examination. Act of 1919, No. 7, Secs. 5, 6, and 7.

**ARIZONA:**

There is no provision for the sale of intoxicating liquor or alcohol as a medicine either upon prescription or otherwise except that extracts, remedies, etc., which do not contain more alcohol than is necessary for the legitimate purposes of extraction, solution, or preservation and which contain drugs in sufficient quantity to medicate such compounds and which are sold for legitimate and lawful purposes, may be manufactured and sold. Laws 1917, Chap. 63, Sec. 2.

**ARKANSAS:**

A physician may prescribe alcohol only to the sick under his charge when he may deem the same necessary, but before issuing any prescriptions the physicians must file with the clerk of the county in which he resides an affidavit certifying that he will not prescribe or furnish any alcohol to any one except when in his judgment it is necessary treatment of the disease with which the patient is at the time afflicted. Secs. 6028-6029 of Code and Amendments of 1919, Chap. 87, Sec. 17.

**CALIFORNIA:**

The enforcement code passed by the Legislature in 1921, known as the Wright Act (St. 1921, p. 79), adopts the Volstead Act by reference. It was approved by the voters upon referendum at the election November 7, 1922. Sustained by the Supreme Court of California in *Ex parte Burke*, decided January 9, 1923.

**COLORADO:**

Registered physicians may prescribe intoxicating liquor for an amount not to exceed four ounces on numbered forms furnished by the Secretary of State and when issued shall be signed by the physician, giving his true, full name, address, date and hour of issuance, and shall state particularly the disease or malady for which prescribed, and true name and address of the patient and the number and date of previous prescriptions to such person within the year next preceding. The prescription must be filled within forty-eight hours of its issuance. Only one sale may be made on a single prescription and the pharmacist filling the same must preserve them open to public inspection for at least two years. Chap. 98, Laws 1915 as amended by Chap. 82, Laws 1917.

**CONNECTICUT:**

Every physician holding a permit from the United States Government to prescribe spirituous and intoxicating liquors may do so. Penalty for violating the provision of the act. Acts 1921, Chap. 291, Sec. 4, p. 3277.

**DELAWARE:**

Physician must be in good standing in his profession and not addicted to the use of intoxicating liquor or drugs. Must personally make a careful examination of the person for whom prescribed. May prescribe pure grain or ethyl alcohol only and copy of prescription must be pasted upon bottle. Act of 1919, Chapter 239, Secs. 4, 8 and 14.

**DISTRICT OF COLUMBIA:**

Intoxicating liquors may be prescribed by a duly licensed and regularly practicing physician upon a written and bona fide prescription. Such prescription shall contain a statement that the disease of the patient requires such a prescription and must be duly signed by the physician issuing. The pharmacist filling such prescription must give it a serial number, cancelling same by writing the word "cancelled" on it, the date on which it was presented and filled and must keep the same on file in consecutive order subject to public inspection at all times during business hours. Such prescriptions cannot be refilled. The pharmacist is required to keep a record book setting forth the date of the sale, the name of the purchaser, who is required to sign his name in this book opposite the entry relating thereto, give the street and house number if there by such. The record must show the kind, quantity and price, purpose for which sold and the name of the physician issuing the prescription. This record book can be required to be produced before the Commissioners of the District or the courts when required. Comp. St. 1918, Ann. Sup. 1919, Secs. 3421- $\frac{1}{4}$ A-3421- $\frac{1}{4}$ S.

**FLORIDA:**

A physician regularly licensed to practice his profession by the State Board of Medical Examiners may prescribe pure alcohol in quantities not exceeding eight ounces at any time for medicinal purposes. To write the prescription the physician must have either a professional knowledge of the case or have made an actual examination of the patient. Prescriptions must be written in substantial compliance with a form set forth

in the statutes, can be filled only by pharmacists regularly licensed under the laws of the State, only upon the day of issuance or next succeeding day. Cannot be refilled, nor can any one person have more than one such prescription filled in any one day. The prescriptions are required to be preserved as a record by the druggist subject to inspection by officers charged with the enforcement of the law. Act of 1919, Chap. 7890 (No. 108), p. 238, amending Sec. 5 of Chap. 7736, Acts of 1918 (Extra Session).

#### GEORGIA :

Pure alcohol may be prescribed but alcohol so prescribed must be so medicated as to render it absolutely unfit for use as a beverage. When dispensed upon prescription the druggist will be held absolutely responsible as to the sufficiency of the medication. (Laws 1919, No. 139, Sec. 4, p. 123.)

#### IDAHO :

There seems to be no provision for prescribing alcohol or liquor in any form for medicinal use. Pharmacists wanting a permit may procure it for compounding medicine, but no provision for prescription as a medicine either in Laws of 1915, Chap. 11, or Laws 1921, Chap. 50, regulating purchase and transportation of alcohol. The later act provides that physicians may purchase for manufacturing, laboratory or scientific purposes only pure alcohol upon the execution of a verified requisition in quadruplicate before the probate judge of the county upon a form to be furnished by the Secretary of State at cost.

**ILLINOIS:**

Physicians upon obtaining a permit granted by the Attorney General may prescribe liquor except wine, beer or alcoholic malt liquor after a careful physical examination of the patient, in a quantity not to exceed one pint for the same patient within a period of ten days. Such prescriptions cannot be refilled. Physicians issuing such prescriptions must keep an alphabetically arranged book to be supplied by the officer issuing the permit which shall show the date of issuance of each prescription, amount prescribed, to whom issued, the purpose or ailment for which issued and directions for its use, stating the amount and frequency of the dose. Laws, 1921, Chap. 43, Sec. 8.

**INDIANA:**

Licensed physicians may prescribe grain or ethyl alcohol only for medicinal purposes. The prescription must contain the name and address of the physician, the kind and quantity of liquor prescribed, the name of the person for whom prescribed, the date on which the prescription is written and directions for the use of the liquor as prescribed. Laws, 1917, Chap. 4, Sec. 13, as amended by Laws, 1921, Secs. 2 and 3.

**IOWA:**

Physicians may procure intoxicating liquor, not including malt liquors, and dispense the same to patients actually sick. They may purchase such liquor from pharmacists who hold a permit from the county auditor authorizing them to sell liquor for medicinal purposes. Citizens not addicted to the use of liquor may purchase liquor for medicinal purposes from pharmacists hold-

ing permits to sell for such purposes by making an application to purchase upon a blank required to be kept by permit holders supplied by the county auditor. This request must show the applicant not a minor, must give name, residence and street number, the amount required and for what use desired. The applicant must be personally known to the permit holder or identified by a subscribing witness to the application.

There appear to be no statutory requirements relative to prescriptions but the Commissioners of Pharmacy of the State are empowered to make rules and regulations to carry into effect the law. Code of 1913, Secs. 2386, 2395 and 2401.

#### KANSAS:

Under Section 5499 of the General Statutes of 1915 wholesalers may sell alcohol to retail druggists for medicinal purposes in quantities of not less than one nor more than five gallons. Also the Bone Dry Act, Chapter 215, Laws of 1917, page 283 contains a similar provision but the retailer must file with the carrier and with the County Clerk a statement showing the date, the quantity and for what purpose such alcohol is to be used. The statement to the Clerk must be filed within ten days after delivery. Hospitals may procure alcohol upon the same conditions. There is no provision for the sale of medicinal liquor at retail upon prescription.

#### KENTUCKY:

Physicians may issue and pharmacists may fill prescriptions for intoxicating liquors, under the restrictions of the National Federal law. Every physician

who issued prescriptions under the Act shall keep duplicates on file in alphabetical order in his office for two years after the date thereof, to be open to the inspection of the County attorney and Commonwealth attorney of the district. The prescription shall state the name and address of the patient, the druggist to whom addressed; the amount required; that the physician is in personal attendance; that the liquor is necessary in the proper treatment of the ailment and shall show the date and name and address of the physician. Laws 1922, Chap. 33, Secs. 32, 33 and 34.

#### LOUISIANA:

Laws 1921, Act No. 39, for enforcing 18th Amendment, contains no provisions relative to prescribing liquor. State governed by Federal law.

#### MAINE:

There is no provision for the sale of medicinal liquor upon prescription. The Code of 1916, Chap. 20, Sec. 17, makes it unlawful for apothecaries to sell intoxicating liquor.

#### MARYLAND:

No general State provision. (Local option laws certain counties.)

#### MASSACHUSETTS:

No general provisions. In some local option territories, pharmacists may sell liquors upon prescription. Sup. Rev. L., p. 770.

**MICHIGAN:**

Any physician lawfully practicing in the State may prescribe intoxicating liquors not to exceed eight ounces. The prescription must state the name and address of the patient, full directions for taking or using, the number of prescriptions the physician has given to the patient within the year preceding and that after a special diagnosis that the physician is satisfied that the intoxicating liquors were necessary to the health of the patient. Acts 1919, No. 53, Sec. 19.

**MINNESOTA:**

Physicians may prescribe intoxicating liquor not exceeding one pint in ten days for the same patient. The prescription must be written in ink, printed or type-written. It must state the name and address of the patient, the kind and quantity of liquor, directions for its use and that the illness for which the liquor is prescribed requires its use. The prescription must be signed in ink and show the date of its issuance and delivery. A prescription cannot be filled after ten days from the date of its issuance and cannot be refilled. Laws 1919, Chap. 455, as amend. Laws 1919,, Ex Sess., Chap. 65, and Laws 1921, Sec. 7.

**MISSISSIPPI:**

Physicians may prescribe pure alcohol in quantities not exceeding one-half pint. The prescription must be written in substantial compliance with a form provided by law. It must be filled the day of issuance or the following day and cannot be refilled. The physician must make an actual examination of the patient.

The pharmacist is required to preserve prescriptions for alcohol and file them at the end of each month with the clerk of the circuit court. Laws 1908, Chap. 113, Sec. 3.

#### MISSOURI:

Physicians may prescribe ethyl alcohol or wine or any other intoxicating liquor in lieu thereof if such physician shall file application with the clerk of the county court in which such physician practices upon a form to be prescribed by the attorney general, in which event the judge of the county court may issue a permit to prescribe upon the same rules and conditions as they are authorized to issue permits to manufacture and sell ethyl alcohol or wine. For this a fee of three dollars is charged, to be paid into the county treasury. Physicians must make a careful physical examination of the patient before issuing such a prescription. The prescription must show the name of the patient, the disease or malady, the date of issuance and state that the liquor is prescribed as a necessary remedy. The druggist filling such prescription is required to attach a copy of the prescriptions filled during each month to the report filed with the clerk of the county court. Laws of 1919 as amended by General Assembly of 1921, Secs. 6592 and 6592-a. "In no case shall any physician holding a permit to write such prescriptions prescribe for any one person more than eight fluid ounces of ethyl alcohol, one quart of wine, or one pint of whiskey (nor) with greater frequency than authorized by Federal law." Laws 1923, Sec. 10, p. 239.

**MONTANA:**

Physicians regularly licensed, holding permits from the Federal government to prescribe liquor as a medicine may record such permit with the Secretary of State of Montana upon the payment of \$2.00. This officer is required to countersign the permit or a certified copy and keep a record thereof whereupon the physician may prescribe not more than one pint of spirituous liquors to be taken internally for use by the same person within a period of ten days. The prescribing of malt liquors containing in excess of one-half of one per centum of alcohol by volume is expressly forbidden. Such prescriptions can be written only after a careful physical examination, or if such examination is found impracticable, then upon the best information obtainable and if the physician in good faith believes that the use of liquor as a medicine by such person is necessary. (Laws 1919, Ex. Sess., Sec. 6.)

**NEBRASKA:**

Regularly licensed physicians may issue prescriptions requiring the use of intoxicating liquors for his own patients provided the other ingredients with which it is mixed or compounded are of such character, and used in such quantities as to render the same unfit for use as a beverage. All such prescriptions shall be on numbered forms, furnished, dated and signed by the physician issuing, stating specifically the ingredients and the liquor and giving the name of the person for whom the prescription is issued. The pharmacist filling such prescriptions must preserve them as a record subject to inspection by the county attorney and the governor. Acts of 1917, Chap. 187, Sec. 25.

**NEVADA:**

Code of 1923 adopting Federal Code by reference held invalid by State Supreme Court.

**NEW HAMPSHIRE:**

Physicians may prescribe intoxicating liquor. The prescription to be written in accordance with a form prescribed by law. The prescription must show the name of the patient, the quantity of liquor, the kind, and give directions as to the amount and frequency of the dose. Such prescriptions must be written only after diagnosis of the disease exercising the same professional skill and care as on prescribing any poisonous or habit forming drug. The pharmacist filling the same must purchase such medicinal liquor from the State liquor agent who is made responsible for the quality of the liquor supplied to druggists. The druggist must also keep a record in which the person having the prescription filled must sign giving his residence address. This record and the prescriptions must be kept open to inspection by enforcement officers. Laws 1919, Chap. 147, Secs. 2, 10 and 12.

**NEW JERSEY:**

Physicians in active practice in the State holding permits from the Federal Government may have the same countersigned by the county clerk whereupon he may prescribe liquor for medicinal purposes, upon compliance with the provisions of the Federal law, Session Laws 1921, Chap. 150, Secs. 20-b, 28, 29, 44 and 45.

**NEW MEXICO:**

Pure grain alcohol only may be sold for medicinal use. Article XXIII amending State Constitution and Chapter 16, Laws 1920. The Legislature of 1923 by Chapter 118 adopted the limitations in the Volstead Act by reference.

**NEW YORK:**

Mullan-Gage law 1921, Chap. 155, Sec. 1214, repealed by Act 1923. No provisions of State law.

**NORTH CAROLINA:**

Session Laws 1923, Senate Bill 631, ratified and effective February 27, 1923, provides that duly licensed physicians, dental surgeons and druggists may receive grain alcohol only to be used in the compounding, mixing or preserving of medicines or medicinal preparations or for surgical purposes. Section 18 of the Act makes it unlawful for any druggist or pharmacist to sell or otherwise dispose of for gain, any intoxicating liquor.

**NORTH DAKOTA:**

Session Laws of 1923, H. B. 50, Section 2-B provides that no physician shall issue any prescription for intoxicating liquors as such, but a physician holding a Federal permit may personally superintend or supervise the administration of intoxicating liquors to his patients where the immediate use of such liquors is necessary to afford relief for some disease, providing that not more than one pint of such liquor may be administered to any one patient within a period of ten

days and no physician shall obtain more than five gallons of such liquor during the calendar year.

#### OHIO:

A physician holding a Federal permit may within ten days of the receipt thereof file a copy with the Commissioner of Prohibition of Ohio, who is required to keep an indexed record of such permit holders. Thereupon such physician may prescribe pure grain or ethyl alcohol or spirituous liquors in quantities not to exceed one-half pint in any period of ten days, for the aged, infirm and known sick. Laws 1921, Secs. 6212-15-2 and 6212-15-b.

#### OKLAHOMA:

Pure grain alcohol only may be prescribed for medicinal purposes. The governor is authorized to prescribe rules and regulations governing its sale. Session Laws of 1911 as amended by Laws 1913, Chap. 70, Sec. 1; Comp. St. 1921, Sec. 6982.

#### OREGON:

Physicians may prescribe ethyl alcohol only upon prescription, if a licensed physician in good standing, actually engaged in the practice of his profession. The prescription must be dated the actual date of issuance. They must be numbered consecutively during each calendar month, the number of each prescription to appear plainly upon its face. It must show the general nature of the ailment, the name and address of the patient and of the physician and must be written in duplicate and on or before the tenth of each calendar month carbon copies must be filed with the clerk of the

county, of all prescriptions issued during the month, together with an affidavit certifying that the prescriptions filed constitute a full report of all alcohol prescribed during the month. Provision is also made whereby the physician may procure and administer alcohol to patients in certain cases, but not to be sold by such physician. General Laws 1917, Chap. 40, Sec. 2.

#### PENNSYLVANIA:

No provisions of State law.

#### RHODE ISLAND:

No physician shall prescribe except upon obtaining a Federal permit. Acts 1922, Chap. 2231, Sec. 4.

#### SOUTH CAROLINA:

Pure alcohol only may be prescribed in quantities not exceeding one-half pint. The physician must write his prescription in substantial compliance with a form set forth in the statute. Such physician must be a regular practicing physician of the State. He must make an actual examination of the patient and may prescribe alcohol only when in his professional judgment the use of such alcohol is absolutely necessary to alleviate or cure the disease from which the patient is suffering. Such prescriptions can be filled only upon the day of issuance or the following day and may not be refilled nor can they be filled at any drug store in which the physician is financially interested. The alcohol can be delivered by the druggist only to the patient or to some one authorized by the physician to receive it, except in the case of minors in which event it may be delivered to the parent or guardian of such minor. Prescrip-

tions must be preserved by the druggist, recorded and indexed and at the end of each calendar month filed with the clerk of the court of the county in which such drug store is located. The record and prescriptions are required to be kept subject to inspection by the enforcement officers. Criminal Code of 1921, Secs. 797, 798 and 802.

#### SOUTH DAKOTA:

Physicians in active practice, of good moral character, may make application to the State Sheriff for a permit to prescribe spirituous or vinous liquors. That officer may in his discretion grant such permit upon the payment of a fee of one dollar. For violation of the terms of the permit the State Sheriff may revoke such permit in which event the physician may appeal to the appeal board consisting of the Governor, Attorney General, and State Sheriff. (Sec. 10255 Revised Code of 1919.) Prescriptions for spirituous and vinous liquor must be written in ink, indelible pencil or on a typewriter, shall be signed by the physician and shall have on it the number of the physician's permit, the date of issuance, the name of the patient, that it is needed for actual sickness, the name of the ailment or disease, the kind and quantity of liquor prescribed, the dose, the number of prescriptions written for the same patient and the total amount prescribed during the preceding three months. The physician must retain a carbon duplicate and on the original must stamp the word "Original" and upon the carbon the word "Copy." Each prescription must be in numerical order and the number on the carbon must correspond with that on the original. The physician must

also keep a record of such prescriptions showing the name and residence of the patient, the date filled, the kind of liquor prescribed, the quantity, the disease and total quantity prescribed by him for such patient during the preceding three months. This record to be open to inspection during business hours by enforcement officials. On or before the 5th of each month duplicate copies of this record with the carbon copies of the prescriptions together with an affidavit certifying the same constitute a true, full and correct statement of all prescriptions issuing during the month must be filed with the county auditor who shall file one record in his office and forward them to the State Sheriff. Revised Code of 1919, Secs. 10273, 10274 and 10275.

#### TENNESSEE:

Physicians of good standing actually engaged in the practice of the profession and not of intemperate habits, may prescribe alcohol only in quantities not exceeding one pint for medicinal use. Such prescriptions may not be filled after three days of the date of issuance, must be written in triplicate, contain the name of the patient, the address, directions for use, must be signed by the physician, and give his address. The physician is required to keep one copy of such prescription for a period of two years and on or before the eighth day of each month must mail one copy of all such prescriptions issued by him during the previous calendar month to the Pure Food and Drug Department of the State. The druggist is also required to keep a record of all such prescriptions filled. Such records are to be kept open to the inspection of enforcement officers. Laws 1917, Chap. 68, Secs. 4, 5 and 6.

**TEXAS:**

Physicians may prescribe pure alcohol only in quantities not exceeding one pint. In order to do so the physician must procure a permit from the Comptroller of Public Accounts for which a fee of five dollars is charged. That officer is required to furnish at cost to the physician the necessary prescriptions and record books. The prescriptions are required to be in book form numbered serially from one to one hundred and each book to be given a number with a stub carrying the corresponding number and data as the prescription bearing that number. The book containing the copy of such stub must be returned to the Comptroller of Public Accounts along with all defaced blanks written six months after the date of delivery of such book. Physicians must make a careful, personal, physical examination of the patient before issuing such a prescription, which is valid only when written upon the prescribed form. No such prescription may be filled at any drug store in which such physician has any financial interest. Physicians issuing prescriptions for alcohol must preserve a record of such prescriptions, a copy of which record must be filed with the Comptroller of Accounts not later than the fifth day of the month for the quarter preceding. Act 1919, 36 Legislature 2nd Called Session, Chap. 78, Secs. 13, 14 and 19; Penal Code 1920, Chap. 6-A.

**UTAH:**

No physician may prescribe any compound containing in excess of one-half of one per centum of alcohol by volume which is capable of being used as a beverage, or prescribe any medicine containing in total con-

tent of such prescription more than four ounces of alcohol and such prescription may not be refilled within seven days. Sec. 3370 Comp. Laws of 1917, p. 687, being Sec. 30 of Laws of 1917, Chap. 2.

#### VERMONT:

Provides that physicians holding permits from the Federal government to prescribe liquor for medicinal use may within ten days of the receipt of such permit file a copy thereof with the Secretary of State whereupon such physician may prescribe liquor as a medicine upon the limitations of the Federal Law. Secs. 4 and 5, Session Laws 1921 No. 204.

#### VIRGINIA:

Under the State law physicians may prescribe not exceeding two quarts of alcohol, or one gallon of malt or vinous liquors, or one quart of brandy or whiskey. Acts of 1918, Chapter 388, Secs. 8-c and 13. The requirements of the State laws as to prescriptions are not given as in 1920 the legislature by Act of 1920 Chapter 403 provided that whenever prescriptions were issued and filed in accordance with the National Prohibition Act the State prescription should not be required.

#### WASHINGTON:

No provision made for the issuance of prescriptions for intoxicating liquors or alcohol. Licensed physicians may procure alcohol upon securing a permit from the county auditor and may administer the same to their patients, but it is unlawful for a physician to administer diluted alcohol or adulterated alcohol, or al-

cohol compounds with any other substance, in such proportion that it shall be capable of being used as a beverage and no prescription can be issued for alcohol to be diluted or adulterated or compounded with any other substance in such proportions that it shall be capable of being used as a beverage. Sec. 2, Session Laws of 1917, Chap. 19.

#### WEST VIRGINIA:

The law of 1921 provides for the sale by druggists through pharmacists of pure grain alcohol for medicinal purposes and provides that physicians may use the same in the practice of their profession subject to the provisions of the Federal law and the regulations issued thereunder. Laws of 1923, Chap. 29 (Barnes W. Va. Code Ann. Supp. 1923, Chap. 32-A, Sec. 4).

#### WISCONSIN:

Physicians may prescribe intoxicating liquor upon the condition and limitations of the Federal law provided such physician shall make application to the State Prohibition Commissioner and obtain a permit for which a fee of ten dollars is charged to be paid into the general fund of the State treasury. Laws 1921, Secs. 7-b and 9.

#### WYOMING:

Physicians may prescribe spirituous liquors to be taken internally in quantities not exceeding one pint for the same patient within a period of ten days. The physician must make application to the State Commissioner of Law Enforcement and obtain a permit to prescribe, which permits are in force for a period of

one year unless revoked for violation of the law. The physician must make a careful physical examination of the patient, or if this is found impracticable, then upon the best information obtainable, if he in good faith believes that the use of liquor by such patient as a medicine is necessary and will afford relief for some known ailment, he may issue such a prescription. The physician must keep a record alphabetically arranged of all prescriptions for liquor. Laws of 1921, Chap. 117, Sees. 5, 6 and 7. Language same as that of original Volstead Act, would probably receive same construction. (See 32 Op. Att. Gen. 467.)

Argument for Appellant in No. 245.

265 U.S.

(Const., Art. I, § 8, cl. 18,) and by the clause of the Eighteenth Amendment specifically conferring power to enforce by "appropriate legislation" the prohibition of traffic in intoxicating liquors for beverage purposes. P. 558.

4. The Court cannot say, in face of the contrary affirmation by Congress, that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment. P. 560.
5. Nor can it be held that the act is an arbitrary and unreasonable prohibition of the use of valuable medicinal agents, in view of the determination of Congress, and the evidence supporting it, that intoxicating malt liquors possess no substantial and essential medicinal properties, which, as respects the public health, cannot be supplied by permitting physicians to prescribe spirituous and vicious intoxicating liquors in addition to non-intoxicating malt liquors. P. 561.
6. Dealers in beer, ale and stout, who were prevented by the act from disposing of stocks acquired before it was passed, were not thereby deprived of property without due process of law in violation of the Fifth Amendment. P. 563.

Affirmed.

APPEALS from decrees of the District Court which dismissed the bills, for want of equity, in two suits brought by manufacturers and dealers in intoxicating malt liquors, to enjoin the Commissioner of Internal Revenue, and other officials, from enforcing a Supplemental Prohibition Act.

*Mr. Samuel W. Moore*, with whom *Mr. Marcus L. Bell* was on the briefs, for appellant in No. 245.

I. The allegation that Guinness's Stout is a valuable medicinal agent, is to be taken as true, for the purposes of this appeal, notwithstanding the provisions of the Willis-Campbell Act, being admitted by the motion to dismiss.

How can Congress, acting under a constitutional grant of authority to prohibit the manufacture and sale of intoxicating liquor for beverage purposes, prohibit the sale of a recognized medicinal agent for medicinal pur-

poses? The National Prohibition Act itself recognizes the value of malt as well as other liquor for medicinal purposes, and contains carefully drawn provisions which permit the use of intoxicants for medicinal purposes.

The sale and use of sacramental wines, the use of liquor in hospitals and sanitariums, and the use of industrial alcohol are also permitted. A great number of regulations have been made by the Commissioner, with the approval of the Treasury Department, throwing safeguards and restrictions around the sale and prescription of intoxicating liquor for medicinal purposes.

The Eighteenth Amendment did not clothe Congress with the general power to invade the domain of medical authority, or to substitute its judgment for the judgment of the attending physician. Much less may it select a recognized therapeutic agent, such as Guinness's Stout, and declare that it may not be prescribed for a patient, even though the attending physician regards it as essential or indispensable in bringing about a restoration to health. If Congress can select one recognized medical agent, and lawfully prohibit its use, there is no limit to which it may not go. *United States v. Freund*, 290 Fed. 411; *Lambert v. Yellowley*, 291 Fed. 640.

The determination of questions of fact is a judicial and not a legislative question. *Block v. Hirsh*, 256 U. S. 135; *Shoemaker v. United States*, 147 U. S. 282; *Producers Transportation Co. v. Railroad Commission*, 251 U. S. 228; *Monongahela Nav. Co. v. United States*, 148 U. S. 312.

II. The grant of power contained in the Eighteenth Amendment is limited by the reservations of the Tenth Amendment. The two amendments effect a division of legislative power over intoxicating liquor, the Congress and state legislatures being vested with concurrent legislative power over intoxicating liquor for beverage purposes, and the legislatures of the several States retaining

Argument for Appellant in No. 245.

265 U. S.

exclusive legislative power over intoxicating liquor for non-beverage purposes. *United States v. Lanza*, 260 U. S. 377.

It is true that Congress in the exercise of a delegated power, such as the power to prohibit the use of intoxicating liquor for beverage purposes, possesses the incidental power to enact such laws and make such regulations as will effectively prevent the manufacture, sale or transportation of intoxicating liquor for the prohibited purposes; but the exercise of this incidental power must stop short of the actual prohibition of the manufacture and sale of intoxicating liquor for non-beverage purposes. Otherwise the legislative control of the several States over intoxicating liquor for non-beverage purposes, reserved to them by the Tenth Amendment, would be nullified.

The incidental power of Congress to give full effect to a delegated power cannot, consistently with the Tenth Amendment, wholly deprive the States of the power which that amendment reserves to them. In other words, judicial construction cannot write into the Eighteenth Amendment authority to prohibit the manufacture and sale of intoxicating liquor for non-beverage purposes, as well as for beverage purposes. To do so would be to strike the words "for beverage purposes" from the amendment. Had the amendment when submitted to the legislatures of the several States contained a delegation of authority to Congress to prohibit the manufacture, sale or transportation of intoxicating liquor for non-beverage, as well as beverage, purposes, there is no reason to suppose that it would have received the ratification it did.

It is of the utmost importance to bear in mind that the power over the manufacture and sale of intoxicating liquor, similar to the power to regulate intrastate and interstate commerce, is a divided power, a part of this power being vested in the general government and a part

being reserved to state governments. The state powers may not encroach upon the power of Congress, nor may the power of Congress encroach upon the state power to the extent of occupying the entire legislative field. The Constitution itself creates a dividing line which neither may cross.

It should also be borne in mind that this is not a case where Congress acts in the exercise of a power covering the entire legislative field, as it did in *Ruppert v. Caffey*, 251 U. S. 264.

Nor is it like the case of *Purity Extract Co. v. Lynch*, 226 U. S. 192, where an act of the Legislature of Mississippi prohibiting the sale of malt liquors was upheld. There the state authority was exclusive, covering the entire legislative field, and it could regulate or prohibit as its public policy might require. In neither case was there any constitutional division of power between national and state governments.

III. The incidental power possessed by Congress to make effective its power to prohibit the sale of intoxicating liquor for beverage purposes, cannot be constitutionally exercised so as wholly to prohibit its sale for non-beverage purposes.

There are well-recognized limitations upon the incidental power of Congress to make effective the exercise of its authority under an express or delegated power. *Hammer v. Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill v. Wallace*, 259 U. S. 44. The right to control this subject matter has been exclusively reserved to the several States. While it may be incidentally affected by proper congressional action, it cannot be wholly destroyed. *Employers' Liability Cases*, 207 U. S. 463.

The Tenth Amendment is a limitation imposed by the Constitution upon the action of Congress, and this limi-

Argument for Appellant in No. 245.

265 U. S.

tation should receive a liberal, and not a narrow construction. *Fairbank v. United States*, 181 U. S. 283; *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *Boyd v. United States*, 116 U. S. 616; *Adair v. United States*, 208 U. S. 161; *United States v. Dewitt*, 9 Wall. 41; *Collector v. Day*, 11 Wall. 113; *Keller v. United States*, 213 U. S. 138; *Kansas v. Colorado*, 206 U. S. 46.

Congress may go no further than is reasonably necessary to put an end to traffic in intoxicating liquor for beverage purposes. *Wisconsin R. R. Comm. v. Chicago, etc., R. R. Co.*, 257 U. S. 563.

The effect of the Eighteenth and Tenth Amendments, considered together, is to vest in the several States the power to regulate or prohibit the use of malt liquors for non-beverage purposes. The effect of this act, if valid, is to divest the States of every shred of authority over the subject.

IV. The enforcement of the act will deprive the appellant of its property without due process of law, and take its property for public use without just compensation, in violation of the Fifth Amendment. *Chicago & N. W. Ry. Co. v. Nye Schneider Fowler Co.*, 260 U. S. 35; *Truax v. Corrigan*, 257 U. S. 312; *Davidson v. New Orleans*, 96 U. S. 97; *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512; *Scott v. Toledo*, 36 Fed. 385; *Caldwell v. Texas*, 137 U. S. 692; *Leeper v. Texas*, 139 U. S. 462; *Giozzi v. Tiernan*, 148 U. S. 657; McGhee, Due Process of Law, p. 60; Willoughby, Const., pp. 873, 874.

The act made no provision for compensating the appellant for the loss which it would sustain from its enforcement, nor did it postpone the effective date of the act for a period during which the appellant might dispose of its stock. Immediately upon its passage it was approved, and at once became effective. *Ruppert v. Caffey*, 251 U. S. 264, and *Mugler v. Kansas*, 123 U. S. 623, distinguished.

*Mr. Nathan Ballin*, with whom *Mr. William M. K. Olcott* and *Mr. Walter E. Ernst* were on the brief, for appellant in No. 200.

I. The Eighteenth Amendment prohibited the use of intoxicating liquors for beverage purposes only. Op. Atty. Gen., March 3, 1921; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146; *Ruppert v. Caffey*, 251 U. S. 264; *National Prohibition Cases*, 253 U. S. 350.

In *Purity Extract Co. v. Lynch*, 226 U. S. 192, it was decided only that the State might in the exercise of its police power prohibit the use of non-intoxicating malt liquors in order effectually to carry out its state prohibition. There cannot, in the course of that opinion, be found any specific authority to hold that what was permitted to the States, was likewise delegated to Congress, for the prohibition of liquors for medicinal purposes was not included in the delegation of power covered by the Eighteenth Amendment. It is apparent that the power of the States to enforce prohibition, resting on the general rights of the State to regulate the health of its citizens, was a broader function, and not subject to the limitation which has been fastened upon Congress by the express language of the Eighteenth Amendment.

The distinction between national and state functions still remains, and the powers which are undelegated still rest in the States.

Among these functions, the power to regulate health was never delegated by the States to Congress, and is, therefore, a power expressly reserved to the States. It is apparent that the right to practice medicine, the right to manufacture drugs, and the right to manufacture liquors for medicinal purposes, still exist undisturbed, and that Congress has no express power to interfere with these rights. If, in the regulation of national prohibition for beverage purposes, it becomes necessary to establish certain restrictions upon the manufacture of intox-

Argument for Appellant in No. 200.

265 U. S.

eating liquors for non-prohibited purposes, these restrictions must always be taken in connection with the constitutional right of the individual to enjoy those privileges of life, liberty and pursuit of happiness, which are guaranteed to him under the Constitutions not only of the United States, but also of the States.

In the decisions of this Court, this distinction is manifested in the cases in which acts of Congress have been held to be unconstitutional because they violate state functions, or because Congress has transcended its power. *Marshall v. Gordon*, 243 U. S. 521.

That the exercise of the regulation of health is purely a matter of state control is exemplified in *Keller v. United States*, 213 U. S. 138; and *Hoke v. United States*, 227 U. S. 308.

More recently this Court has held that the power of Congress, even though intended to be beneficial, may not be asserted in respect to a purely state function. *Child Labor Tax Case*, 259 U. S. 20.

The power of the State in respect of health has also been recognized by such cases as *Jacobson v. Massachusetts*, 197 U. S. 11; *Dent v. West Virginia*, 129 U. S. 114; and *Watson v. Maryland*, 218 U. S. 173, in all of which the power of the State to regulate vaccination and the practice of medicine is distinctly asserted and established as a state and not a national function. See also *Hammer v. Dagenhart*, 247 U. S. 251. *United States v. Doremus*, 249 U. S. 86, distinguished.

A striking illustration of the constitutional right of a person to be treated medicinally as he chooses, or in fact, not to be treated at all, appears in *People v. Cole*, 219 N. Y. 98.

II. The prohibition of intoxicating malt liquors for medicinal purposes is neither an appropriate nor a reasonable exercise of the prohibitory power of Congress.

The power to prohibit the use of liquors as a beverage does not extend to the power to prohibit them as a medi-

cine. *Sarrs v. Commonwealth*, 83 Ky. 427; Freund, Police Power, p. 210; *Lambert v. Yellowley*, 291 Fed. 640; *United States v. Freund*, 290 Fed. 411.

May a legislature declare a scientific fact because it has instituted some investigation? Because of such investigation, may Congress arbitrarily assume that malt liquors have no medicinal properties? In its last analysis, the scientific or medicinal value of the product should rest with the physician. Congress has transgressed not only the constitutional right of the physician to determine what is beneficial for his patients, but also the constitutional right of the patient to receive from the physician the prescription of malt liquors, if the physician deems it best for the health of his patient. In this enactment Congress assumed a function which it did not constitutionally possess. The power to define what is intoxicating, namely, the limitation to an aleoholic content of  $\frac{1}{2}$  of one per cent., may not be extended so as to give Congress power, also, to declare non-medicinal a form of liquor which has been recognized by leading physicians as having marked medicinal and therapeutic properties.

*Mr. Joseph S. Auerbach*, with whom *Mr. Martin A. Schenck* was on the brief, on behalf of Samuel W. Lambert, by special leave of Court, as *amicus curiae*.

*Mr. Solicitor General Beck*, with whom *Mrs. Mabel Walker Willebrandt* and *Mr. Mahlon D. Kiefer* were on the brief, for appellees.

*Mr. H. H. Griswold*, on behalf of the Attorneys General of the States of Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, West Virginia and Wyoming, by special leave of Court, as *amicus curiae*.

Opinion of the Court.

265 U.S.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These two cases were heard together. They involve the single question whether § 2 of the Supplemental Prohibition Act of November 23, 1921, c. 134, 42 Stat. 222, is constitutional, in so far as it prevents physicians from prescribing intoxicating malt liquors for medicinal purposes. This section of the act provides: "That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void."

The Eighteenth Amendment to the Constitution provides that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes is hereby prohibited" (§ 1); and that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." (§ 2.)

The National Prohibition Act (41 Stat. 305), enacted in pursuance of this Amendment, provides that no person shall "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor" except as authorized in the act, and that all its provisions shall be liberally construed to the end that "the use of intoxicating liquor as a beverage" may be prevented, Tit. II, § 3; that intoxicating liquor "for nonbeverage purposes" may be manufactured, sold, etc., "but only" as provided in the act, and the Commissioner of Internal Revenue may issue permits therefor, *Ib.*, § 3; that no one shall manufacture, sell or prescribe intoxicating liquor without first obtaining a permit from the Commissioner, § 6; that no permit shall be issued for the sale of intoxicating liquor at retail except through a pharmacist licensed to dispense medicine prescribed by physicians,

§ 6; that no one shall be given a permit to prescribe intoxicating liquor except a licensed practicing physician, § 6; that no one but a physician holding such permit shall issue any prescription for intoxicating liquor, § 7; and that not more than a pint of "spirituous liquor" shall be prescribed for the same person within any period of ten days, § 7.

Under the Regulations adopted by the Treasury Department after the passage of the act, physicians obtaining permits were authorized to prescribe only distilled spirits, wines, and certain alcoholic medicinal preparations. T. D. 2985. In October, 1921, pursuant to an opinion of the Attorney General that the Commissioner might issue permits for the manufacture of beer and other intoxicating malt liquors, as well as whisky and vinous liquors, for medicinal purposes (32 Ops. Atty. Gen. 467), the Regulations were amended so as to authorize the Commissioner to issue permits for the manufacture of intoxicating malt liquors for medicinal purposes, and to permit physicians to prescribe them. T. D. 3239.

In November Congress passed the Supplemental Act now in question, containing in § 2, as has been stated, the provision that "only spirituous and vinous liquor may be prescribed for medicinal purposes," and that all prescriptions for any other liquor<sup>1</sup> and permits therefor shall be void. The direct effect of this provision is to prohibit physicians from prescribing intoxicating malt liquors for medicinal purposes, and the Commissioner from issuing permits authorizing such prescriptions. This section also limits prescriptions for vinous liquor to one-

<sup>1</sup>The word "liquor" is used as meaning "intoxicating liquor" as defined in the Prohibition Act (Tit. II, § 1), including beer, ale, porter, and any malt liquor containing one-half of one per centum of alcohol by volume and fit for use for beverage purposes. Supp. Act, § 1.